



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



A

130

Bd Oct 1925



HARVARD LAW LIBRARY

Received Dec 11. 1889.







Aug 27 17

# NOTES

ck

ON THE

## GENERAL STATUTES

OF

### MASSACHUSETTS.

TO WHICH IS ADDED

A LIST OF CITIES AND TOWNS IN THE STATE, AND OF  
CERTAIN STATE AND COUNTY OFFICERS.

BY

*askell*  
URIEL H. CROCKER AND GEO. G. CROCKER.

8.

BOSTON:

LITTLE, BROWN, AND COMPANY.

1869.

Entered according to Act of Congress, in the year 1869, by  
U. H. CROCKER AND G. G. CROCKER,  
in the Clerk's Office of the District Court of the District of Massachusetts.

*Rec. Dec. 11, 1889*

CAMBRIDGE:  
PRESS OF JOHN WILSON AND SON.

## P R E F A C E.

---

HAVING, since 1860, been in the habit of noting in the margin of my copy of the General Statutes of Massachusetts all subsequent statutes and all the more important explanatory decisions which have appeared in the volumes of reports published since that date, stating in a short and rough way the purport of the statute or decision to which reference was made, I had accumulated a mass of marginal references which were extremely valuable and useful to me. It finally occurred to me that these marginal notes might be made useful to others, if they were printed in a separate volume in the form in which they are now published. In pursuance of this idea, all these marginal notes have been written out in a more presentable shape by myself and my brother, and in all the more important chapters we have also stated the purport, so far as it seemed noteworthy, of all the cases, references to which are printed in the margin of the statutes. This has been done in chapters 1-5, 8, 9, 11-23, 27, 29, 32-37, 40, 45, 47-49, 51, 54-57, 64-66, 68, 75-84, 86, 87, 89-111, 115, 117, 119, 123-133, 137, 139-142, 147, 151, 153, 154,

and 157, and in the statutes subsequent to the General Statutes ; — in the other chapters, this has been done only partially.

The references in this volume to subsequent *statutes* are, it is hoped, substantially complete ; — with regard to the references to *decisions*, however, it is evident that some, which ought properly to have been noted, may have been overlooked, and that the true purport of others, which are noted, may have been misapprehended ; and it is hoped and desired that all members of the legal profession in this state, who may notice any omissions or any errors in this work, will, as a matter of mutual interest and benefit, give information thereof by mail or otherwise, in order that such omissions may be supplied, and such errors corrected in a second edition, should a second edition ever be called for. The latest decisions which have been noted are those contained in Vol. 98 of the Massachusetts Reports, — of the earlier decisions, those to be included in Vol. 16 of Gray's Reports, as that volume is not yet published, are not referred to.

URIEL H. CROCKER.

Boston, Sept. 27th, 1869.

# NOTES

ON THE

## GENERAL STATUTES OF MASSACHUSETTS.

---

### PART I.

#### OF THE INTERNAL ADMINISTRATION OF THE GOVERNMENT.

---

#### TITLE I.

##### OF THE JURISDICTION OF THE COMMONWEALTH, LEGISLATURE, STATUTES, PUBLIC REPORTS, AND DOCUMENTS, STATE LIBRARY, AND OTHER PUBLIC PROPERTY.

---

##### CHAPTER I.

###### OF THE JURISDICTION OF THE COMMONWEALTH AND PLACES CEDED TO THE UNITED STATES.

SECT. 3. Jurisdiction ceded to the United States over additional places, as follows: Tracts of land in Charlestown. St. 1862, c. 195. — St. 1867, c. 35. — St. 1868, c. 249. Additional tract on Long Point in Provincetown. St. 1864, c. 77. Tract of land in Malden. St. 1864, c. 283. Winter Island in Salem Harbor. St. 1865, c. 109. Additional tract in Watertown. St. 1867, c. 259. Tract at Woods's Hole in Falmouth. St. 1867, c. 288. Parts of Long Island in Boston Harbor. (St. 1867, c. 314). — St. 1868, c. 292. — St. 1868, c. 293. Parts of Gallop's Island and Point Alderton in Boston Harbor. St. 1867, c. 315. Lot on Water, Milk, and Devonshire Streets in Boston for a Post Office and U. S. Treasury. St. 1868, c. 323. Sites of Fort Andrew and Fort Standish at entrance of Plymouth Harbor. St. 1869, c. 458.

Persons who reside on lands ceded to the United States, when there is no other reservation of jurisdiction to the state than that of a right to serve civil and criminal process on such lands, are not entitled to the benefits of the common schools for their children in the towns in which the lands are situated; nor are they liable to be assessed for their polls and estates to state, county, and town taxes in such towns; nor do they gain a settlement in such towns for themselves or their children by residence for any length of time on such lands; nor do they acquire, by residing on such lands, any elective franchise as inhabitants of such towns. Opinion of Justices, 1 Met. 580.

Nor in such case would the transporting of stone from another state to a place so ceded be a transporting of stone "within this commonwealth" in the sense of a statute affixing a penalty to such transportation. *Mitchell v. Tibbetts*, 17 Pick. 298.

Offences committed within such lands are not punishable by the courts of this commonwealth. *Commonwealth v. Clary*, 8 Mass. 72, 77.

## CHAPTER II.

### OF THE LEGISLATURE.

#### *Applications to the Legislature.*

The secretary of the commonwealth to publish annually on first Wednesday in January a list of all petitions to the general court. St. 1865, c. 245.

SECT. 8-10. Notice may in certain cases be given after the time limited in these sections. St. 1862, c. 91, s. 1. May be waived by all parties. St. 1862, c. 91, s. 2.

SECT. 10. Provision as to notice upon application for charter of street railway company. St. 1864, c. 229, s. 11.



SECT. 12. Other evidence of publication of notice not excluded. St. 1862, c. 91, s. 3.

*Compensation of Members and Officers.*

SECT. 13, 14. Repealed by St. 1865, c. 228.

SECT. 17. Amended by St. 1867, c. 167, s. 1, and St. 1867, c. 305.

SECT. 18, 19. Repealed by St. 1865, c. 228.

*Miscellaneous Provisions.*

SECT. 22. Amendments to the constitution to be engrossed. St. 1865, c. 156.

*Additional.* The clerk of the senate to hold office until his successor is chosen and qualified. St. 1868, c. 37.

## CHAPTER III.

### OF THE STATUTES.

*Promulgation of the Laws.*

SECT. 1. The volume of laws to contain all amendments to the constitution of the state. St. 1865, c. 156. Also modifications and changes of pilotage regulations. St. 1862, c. 176, s. 17. 3,000 copies of the volume to be printed. St. 1866, c. 65, s. 1.

SECT. 2. Copies to be furnished also, "upon application of the librarian thereof, to every athenæum, every incorporated, and every public library, established under the laws of this commonwealth." St. 1866, c. 65, s. 2.

SECT. 3. This section repealed and superseded by St. 1862, c. 85, which was in its turn repealed and superseded by St. 1866, c. 65, s. 3.

SECT. 4. Amendments to the state constitution to be published in like manner. St. 1865, c. 156. So also modifications and changes of pilotage regulations. St. 1862, c. 176, s. 17. Limit of annual expense raised to five hundred dollars. St. 1865, c. 193.

SECT. 6. Resolves to take effect upon their passage unless otherwise specially provided. St. 1864, c. 287.

Where a statute provides for the appointment of officers, an appointment made before the day when the act goes into effect is void. Opinion of Justices, 3 Gray 601, 606.— *Commonwealth v. Fowler*, 10 Mass. 290.

It seems that an act, which is to take effect "from and after its passage," takes effect at the precise point of time when it is approved by the governor. *Kennedy v. Palmer*, 6 Gray 316.

*Construction of Statutes.*

SECT. 7. *First Clause.* See *Howard v. Harris*, 8 Allen 297, 298.

*Third Clause.* For cases in which this rule has been applied, see *Howard v. Proctor*, 7 Gray 128, 131.— *Reynolds v. New Salem*, 6 Met. 340, 343.— *Coffin v. Nantucket*, 5 Cush. 269, 272.

*Fifth Clause.* As to the meaning of the words "grantor" and "grantee," see *Tasker v. Bartlett*, 5 Cush. 359, 365.— *Dudley v. Sumner*, 5 Mass. 438, 471.

*Thirteenth Clause.* For cases in which this rule has been applied, see *Lewis v. Dabney*, 4 Cush. 588, 589.— *Commonwealth v. Boston & Maine R.R.*, 3 Cush. 25, 45.

The same rule applies to the word "individual." *Otis Company v. Ware*, 8 Gray 509, 510, 511.

*Fifteenth Clause.* As to the seal of a corporation, see *Hendee v. Pinkerton*, 14 Allen 381, 387.— *Bates v. New York Central R.R.*, 10 Allen 251.

*Twentieth Clause.* This adopts the rule as laid down by the supreme court in *Henshaw v. Foster*, 9 Pick. 312.

*Additional.* "An act to establish certain rules for the construction of repealing statutes." St. 1869, c. 410.

As to the construction of licenses from the state for building upon, filling up, or enclosing ground over which the tide ebbs and flows, see St. 1869, c. 432, s. 2-4.

The following list contains other words and phrases, occurring in the statutes, which have at different times received a construction from the supreme court:—

- Actual notice.* See notes to Gen. St. c. 89, s. 315.  
*Adrift.* See note to Gen. St. c. 83, s. 20.  
*Agent.* See notes to Gen. St. c. 58, s. 66, 77.  
*Altering.* See note to Gen. St. c. 43.  
*Bridge.* See note to Gen. St. c. 44.  
*Business.* See note to Gen. St. c. 133, s. 32, clause 5.  
*Charitable.* See note to Gen. St. c. 11, s. 5, clause 3.  
*Children.* See note to Gen. St. c. 92, s. 25.  
*Citation.* See note to Gen. St. c. 94, s. 1, clause 1.  
*Civil suit.* See note to Gen. St. c. 129, s. 41.  
*Committed.* See note to Gen. St. c. 73, s. 25.  
*Contingent.* See note to Gen. St. c. 99, s. 5.  
*Court of record.* See note to Gen. St. c. 155, s. 1, clause 1.  
*Cow.* See note to Gen. St. c. 133, s. 32, clause 4.  
*Deed.* See note to Gen. St. c. 89, s. 28.  
*Desertion.* See note to Gen. St. c. 107, s. 7.  
*Died seized.* See note to Gen. St. c. 90, s. 3.  
*Disinterested.* See notes to Gen. St. c. 103, s. 3, and Gen. St. c. 123, s. 74.  
*Embezzle.* See notes to Gen. St. c. 161, s. 35, 38.  
*Erected.* See note to St. 1860, c. 109.  
*Evidently unsuitable.* See notes to Gen. St. c. 100, s. 8, and Gen. St. c. 101, s. 2.  
*Expense.* See note to Gen. St. c. 43, s. 12.  
*Extreme cruelty.* See note to Gen. St. c. 107, s. 9.  
*Fines.* See *Hanscomb v. Russell*, 11 Gray 373, 375.  
*Game.* See notes to Gen. St. c. 85, s. 1, 2, and Gen. St. c. 87, s. 6.  
*Going at large.* See *McAneany v. Jewett*, 10 Allen 151.  
*Good faith.* See note to Gen. St. c. 142, s. 28.  
*Individual.* See *Otis Company v. Ware*, 8 Gray 509, 510, 511.

- Importer.* See note to Gen. St. c. 86, s. 25.
- Keeper.* See note to Gen. St. c. 88, s. 59.
- Keep open.* See note to Gen. St. c. 84, s. 1.
- Kindred.* See note to Gen. St. c. 70, s. 5.
- Lanes.* See note to Gen. St. c. 61, s. 16.
- Lewdness.* See note to Gen. St. c. 87, s. 6.
- Lien.* See *Briggs v. A Light Boat*, 7 Allen 287, 295.
- Live.* See *Shaw v. Shaw*, 98 Mass. 158, 159.
- Machinery.* See note to Gen. St. c. 11, s. 12, clause 2. Also note to St. 1865, c. 283, s. 1.
- Magistrate.* See note to Gen. St. c. 89, s. 19.
- May.* See *Way v. Carlisle*, 13 Allen 398, 399.
- Meet.* See note to Gen. St. c. 77, s. 1.
- Motion for a new trial.* See note to Gen. St. c. 133, s. 7.
- Necessaries.* See note to Gen. St. c. 142, s. 29.
- Necessary.* See notes to Gen. St. c. 133, s. 32, clauses 2, 5.
- Necessity.* See note to Gen. St. c. 84, s. 1.
- Pauper.* See note to Gen. St. c. 70, s. 5.
- Personal actions.* See note to Gen. St. c. 142, s. 1.
- Persons interested.* See note to Gen. St. c. 100, s. 9.
- Place of business.* See note to Gen. St. c. 11, s. 15.
- Poor persons.* See note to Gen. St. c. 70, s. 4.
- Railroad.* See note to Gen. St. c. 63, s. 59.
- Removed from office.* See note to Gen. St. c. 128, s. 11.
- Repair.* See note to Gen. St. c. 44.
- Reside.* See *Shaw v. Shaw*, 98 Mass. 158, 159.
- Resorted to.* See note to Gen. St. c. 87, s. 6.
- Road.* See note to Gen. St. c. 77, s. 1.
- Sell.* See notes to Gen. St. c. 86, s. 28, 30.
- Specific devise.* See note to Gen. St. c. 92, s. 30.
- Suitable fences.* See note to Gen. St. c. 63, s. 43.
- Travel. Traveller.* See notes to Gen. St. c. 84, s. 2, and Gen. St. c. 44, s. 22.
- Trustee.* See note to Gen. St. c. 11, s. 12, clause 5.
- Wills.* See note to Gen. St. c. 92, s. 8.

The following general rules for the construction of statutes have been laid down by the supreme court:—

Punctuation is not to be regarded in construing statutes. *Cushing v. Worrick*, 9 Gray 382, 385.

A limiting clause is ordinarily to be confined to the last antecedent, unless there is something in the subject matter which requires a different construction. *Cushing v. Worrick*, 9 Gray 382, 385.

Statutes are to be construed “according to the manifest intent of the legislature, though apt words to express that intent may not be used, or though such construction may not accord with the letter of the statute.” *Commonwealth v. Dracut*, 8 Gray 455, 457. — *Howard v. Harris*, 8 Allen 297, 298.

“The law does not favor the *repeal of a statute by implication*. If there are no words of repeal a subsequent statute will not be held to abrogate a former one on the same subject if by a fair and reasonable construction both can stand together. It is only when the later statute covers the whole ground of a former statute, or the provisions of the two are repugnant to or inconsistent with each other, that it will be held that the more recent enactment repeals the earlier one upon the same subject matter.” Per BIGELOW, J., in *Commonwealth v. Flannelly*, 15 Gray 195.

“Whenever a statute is passed which embraces all the provisions of previous statutes on the same subject, the new statute operates as a repeal of all antecedent enactments. This well settled rule of interpretation is founded on the reasonable inference that the legislature cannot be supposed to have intended that there should be two distinct enactments, embracing the same subject matter, in force at the same time, and that the new statute, being the most recent expression of the legislative will, must be deemed a substitute for previous enactments and the only one which is to be regarded as having the force of law.” Per BIGELOW, C. J., in *Commonwealth v. Keliher*, 12 Allen 480, 481.

When the time limited by statute for the doing of a certain act is less than a week, Sunday is to be excluded from the computation. *Hannum v. Tourtellott*, 10 Allen 494, 495. — *Commonwealth v. Certain Intox. Liquors*, 97 Mass. 601, 602. — *Thayer v. Felt*, 4 Pick. 354. — *Penniman v. Cole*, 8 Met. 496, 501. But when such time is more than a week, Sundays are to be included. *Robbins v. Holman*, 11 Cush. 26, 29.

“Statutes should never be allowed a *retroactive operation* when this is not required by express command or by necessary or unavoidable implication. Without such implication or command they speak and operate upon the future only. Especially should this rule of interpretation prevail where the effect and operation of a law are designed, apart from the intrinsic merits of the rights of the parties, to restrict the assertion of those rights. *King v. Tirrill*, 2 Gray 331, 333. — *Garfield v. Bemis*, 2 Allen 445, 446, 447.

“The intention of a remedial statute will always prevail over the literal sense of its terms, and therefore when the expression is special or particular, but the reason is general, the expression should be deemed general.” See *Brown v. Pendergast*, 7 Allen 427, 429.

*Validity of remedial statutes affecting vested rights.* Such laws, though they may formally affect vested rights, may be valid if they do not injuriously defeat or impair such rights. *Wildes v. Vanvoorhis*, 15 Gray 139, 147. — *Jacquins v. Commonwealth*, 9 Cush. 279, 281.

*Ex post facto laws.* As to what statutes are invalid as such, see *Jacquins v. Commonwealth*, 9 Cush. 279, 281. — *Dolan v. Thomas*, 12 Allen 421, 424. — *Flaherty v. Thomas*, 12 Allen 428, 434.

## CHAPTER IV.

## OF PUBLIC REPORTS AND DOCUMENTS.

SECT. 1. Annual report of the bank commissioners to be made on or before first day of January, and to include the result of all examinations made during the year preceding that date. St. 1864, c. 94.

SECT. 2. Reports of railroad corporations to be deemed "public" documents, and each of said public documents to bear the same number from year to year. St. 1863, c. 219, s. 2.

SECT. 4. Number of public reports and documents to be printed, altered by St. 1863, c. 219, s. 1.

## CHAPTER V.

## OF THE STATE LIBRARY AND OTHER PUBLIC PROPERTY.

SECT. 12. Tents and camp materials may be lent to military schools. St. 1866, c. 295.

*Additional.* All licenses, granted in session of 1869 or afterwards, to build upon, fill up, or enclose ground over which the tide ebbs and flows, to be subject to certain conditions. St. 1869, c. 432.

---

TITLE II.

## OF ELECTIONS.

---

CHAPTER VI.

## OF THE QUALIFICATIONS OF ELECTORS.

SECT. 1. All Indians within the state declared to be citizens. St. 1869, c. 463, s. 1. (Certain Indians previously allowed rights of citizenship by St. 1864, c. 184.)



Article 23 of the amendments to the state constitution having been repealed, all reference to it in this section might be omitted. See 26th Article of Amendment, printed at end of Supplement to Statutes for the year 1863.

No person to vote for representative to congress unless he has resided in the district six months, &c. St. 1861, c. 145.

SECT. 6. No name to be added to the voting lists in any city after the lists have been placed in the hands of the ward officers unless, &c. St. 1867, c. 206. As to the law on this point prior to this statute, see *Waite v. Woodward*, 10 Cush. 143.

As to the proper mode of proceeding at such hearings as are provided for in this section, see *Lombard v. Oliver*, 7 Allen 155, 156.

SECT. 11. As to the force and effect of this section, see *Lombard v. Oliver*, 3 Allen 1, 3. — *Blanchard v. Stearns*, 5 Met. 298, 301.

## CHAPTER VII.

### OF THE MANNER OF CONDUCTING ELECTIONS AND RETURNING VOTES.

SECT. 2. "Meetings for the election of national, state, county, district, city, and town officers may be opened as early as seven o'clock in the forenoon, and shall be opened as early as two o'clock in the afternoon of the election day, but in no case shall the polls be kept open after the hour of sunset." St. 1869, c. 62. (Previous alteration of time of opening by St. 1867, c. 50.)

SECT. 3. The warrant for calling meetings for the election of state officers, representatives to congress, and presidential electors must specify the hour at which the polls *may* be closed, and not lawful to close the polls before that hour. St. 1860, c. 138.

"*But in no case shall the polls be kept open after the hour of sunset.*" This does not apply to elections of town officers. *Conlin v. Aldrich*, 98 Mass. 557.

SECT. 9. In election of town officers not necessary to use

check-list, except when election required by statute to be by ballot; in other cases to be used or not, as town meeting may determine. St. 1862, c. 180.

“In the election of moderators of town meetings, held for the choice of town officers, the check-list shall be used.” St. 1863, c. 198.

For acts ratifying prior elections at which check-lists were not used, see St. 1861, c. 144.—St. 1861, c. 197.—St. 1862, c. 180, s. 2.—St. 1863, c. 130.—St. 1864, c. 195.—St. 1865, c. 182.—St. 1868, c. 262.

SECT. 10. As to the force and effect of this section, and as to the liability of selectmen for rejecting votes, see *Lombard v. Oliver*, 3 Allen 1, 3.—*Blanchard v. Stearns*, 5 Met. 298, 301.

SECT. 15. Ballots cast at elections in cities to be sealed up, and transmitted to the city clerk, &c. St. 1863, c. 144, s. 1–3, 5.

SECT. 17. As to the proper form for making the returns required by this section, see *Luce v. Mayhew*, 13 Gray 83.

SECT. 60. As to the nature of the duties of the board of examiners, see *Luce v. Mayhew*, 13 Gray 83.

#### *Additional Provisions.*

At municipal elections certificates of election of *ward officers* to be sent to the city clerk in sealed envelopes, which shall remain unopened for twenty days, within which time a recount may be demanded. St. 1867, c. 240.

Votes of persons whose right is *challenged*, to be indorsed with name of person offering the vote and of person challenging, &c. &c. St. 1863, c. 144, s. 4.

## CHAPTER VIII.

### OF THE ELECTION OF GOVERNOR AND OTHER STATE OFFICERS.

SECT. 3. This section superseded by St. 1866, c. 221, which divides the state into new councillor districts.

SECT. 4, 5. These sections superseded by St. 1866, c. 120, which divides the state into new senatorial districts.

SECT. 6. For a new apportionment of representatives, see St. 1866, c. 103.

## CHAPTER IX.

OF THE ELECTION OF REPRESENTATIVES IN CONGRESS AND ELECTORS OF PRESIDENT AND VICE PRESIDENT.

SECT. 1. Number of districts altered from *eleven* to *ten*. St. 1862, c. 226, s. 1.

SECT. 2. New districts established by St. 1862, c. 226, s. 2, which has itself been amended by St. 1866, c. 59, and St. 1866, c. 194.

---

## TITLE III.

OF THE ASSESSMENT AND COLLECTION OF TAXES.

---

## CHAPTER XI.

OF THE ASSESSMENT OF TAXES.

*Persons and Property subject to Taxation.*

SECT. 3. "*All buildings*," &c. As to whether a wooden building, belonging to A. but erected on land of B., is to be considered for purposes of taxation as real or as personal estate, see *Flanders v. Cross*, 10 Cush. 514.

SECT. 4. This section is "so far amended that the *income* subject to taxation shall be only so much as exceeds \$1,000, and which has accrued to any person during the year ending on the first day of May of the year in which the tax is assessed." St. 1866, c. 48.

“*Debts due,*” *ſc.* Bonds of a state or city, issued under legislative sanction in aid of works of public interest, are to be considered as “public stocks and securities,” and not as “debts due the persons to be taxed.” *Hall v. County Commissioners*, 10 Allen 100.

“*Stocks in turnpikes, bridges, and moneyed corporations within or without the state.*” The stock of all corporations chartered under the laws of this state, except banks of issue and deposit, is not now taxable to the stockholders. See St. 1866, c. 291, s. 2. — St. 1865, c. 283, s. 15. As to the mode of taxing the personal property of these and other corporations, see “ADDITIONAL PROVISIONS” at the end of the notes on this chapter. As to the mode of taxing the personal property of corporations prior to the above provisions, see *Boston and Sandwich Glass Co. v. Boston*, 4 Met. 181. — *Boston Water Power Co. v. Boston*, 9 Met. 199. — *Worcester Mutual Fire Insurance Co. v. Worcester*, 7 Cush. 600. — *Worcester County Institution for Savings v. Worcester*, 10 Cush. 128.

The only corporations, for the stock of which individuals are now taxable in the cities and towns in which they reside, would seem to be as follows: *First.* All those incorporated under the laws of other states, see St. 1866, c. 291, s. 2. — St. 1865, c. 283, s. 15. *Second.* National Banks situated in this state. St. 1865, c. 242. — *Austin v. Boston*, 14 Allen 359. *Third.* All other corporations not incorporated under the laws of this state. *Fourth.* Such few banks, incorporated under the laws of this state, as may still be in existence. *Fifth.* The Mercantile Institution for Savings of the City of Boston. St. 1867, c. 160, s. 1.

“*Income from a profession, trade, or employment.*” A clerk in a post-office, who is appointed by the deputy postmaster and whose appointment is approved by the postmaster-general, is taxable for his income derived from his employment as such clerk. And further as to whether a tax upon income may be assessed upon a person holding any public office under the general government, see *Melcher v. Boston*, 9 Met. 73.

*Property and Persons exempted from Taxation.*

SECT. 5. *Second Clause.* Lands of the commonwealth, when sold by the commissioners of public lands and agreements for deeds given, are free from taxation for three years, unless previously built upon or improved, and after that time they are taxable, although the deeds are not executed and delivered. St. 1867, c. 101.

*Third Clause.* A corporation established for the purpose of holding a fund for the support of a minister is not, it seems, to be considered a “charitable” institution within the meaning of this section. See *Trustees of Greene Foundation v. Boston*, 12 Cush. 54, 58, 59. See also section 13 of this chapter.

A dwelling-house, belonging to one of the institutions mentioned in this clause, and occupied *under a lease* by one of its officers as his residence, has been held not to be exempt. *Pierce v. Cambridge*, 2 Cush. 611.

*Sixth Clause.* Exemption of mechanics’ tools limited to an amount not exceeding \$300 in value. St. 1865, c. 206.

*Seventh Clause.* “*Houses of religious worship.*” These are exempt only when “owned by a religious society or held in trust for the use of religious organizations.” St. 1865, c. 206.

*Twelfth Clause.* “*The polls and estates of Indians.*” This exemption no longer exists. St. 1869, c. 463, s. 1.

*Additional Exemptions.*

Land *taken for public uses* is exempt from taxation. For instance, land purchased in fee or otherwise taken by a city by authority of the legislature for the purpose of supplying the city with pure water, and used for that purpose only. *Wayland v. County Commissioners*, 4 Gray 500. So also the land taken by a railroad company under its location, and the buildings and structures erected thereon, if they are reasonably incident to the support of the road or to its proper and convenient use. *Worcester v. Western R.R. Co.*, 4 Met. 564. — *Charlestown v. County Commissioners*, 1 Allen 199. But land taken or purchased

for depot or station purposes without the limits of the road, under Gen. St. c. 63, s. 19, or St. 1853, c. 351, is not exempt. See Gen. St. c. 63, s. 20. — St. 1853, c. 351, s. 3. Also *Boston & Maine R.R. v. Cambridge*, 8 Cush. 237. Nor is the property of gas-light companies exempt, as “no public duty is imposed upon them, nor are they charged with any public trust.” *Commonwealth v. Lowell Gas Light Co.*, 12 Allen 75, 77.

*Where Polls and Property shall be Assessed.*

SECT. 6. “*In the place where he is an inhabitant.*” The general rule, and for practical purposes, a fixed rule, is that a man must have a habitation somewhere; he can have but one, and therefore, in order to lose one, he must acquire another. A purpose to change, unaccompanied by actual removal or change of residence, does not constitute a change of domicil. The fact and the intent must concur. *Bulkey v. Williamstown*, 3 Gray 493, 495. The intent may be inferred from the circumstances of the case, and this inference may be so strong as to override the proof of a declaration of the party to the contrary. *Holmes v. Greene*, 7 Gray 299, 301. As to the elements which determine the place of which a person is to be deemed an inhabitant, see further *Harvard College v. Gore*, 5 Pick. 369. — *Thorndike v. Boston*, 1 Met. 242. — *Sears v. Boston*, 1 Met. 250. — *Kilburne v. Bennett*, 3 Met. 199. — *Mead v. Boxborough*, 11 Cush. 362. — *Otis v. Boston*, 12 Cush. 44. — *Cabot v. Boston*, 12 Cush. 52. — *Lee v. Boston*, 2 Gray 484. — *Carnoe v. Freetown*, 9 Gray 357. — *Williams v. Roxbury*, 12 Gray 21. As to the place of which a *corporation* is to be deemed an inhabitant, see *Trustees of Greene Foundation v. Boston*, 12 Cush. 54, 60.

“*Shall be assessed to and in the places of residence of the parents, masters, or guardians,*” &c. A manufacturing corporation employing minors at a salary is not their “master” within the meaning of this section. *Boston and Sandwich Glass Co. v. Boston*, 4 Met. 181.

SECT. 8. "*To the person,*" &c. In the case of banks and manufacturing corporations, taxes on their real estate are to be assessed to them in the place where such real estate is situated. *Tremont Bank v. Boston*, 1 Cush. 142. — *Dunnell Manufacturing Corporation v. Pawtucket*, 7 Gray 277.

SECT. 12. "*All personal estate, within or without this state, shall be taxed to the owner,*" &c. When an inhabitant of this state is interested as partner in the property of a firm established and carrying on business in another state, such interest is legally taxable to him here, although it may be taxable also in such other state. *Bemis v. Boston*, 14 Allen 366.

"*Where he is an inhabitant.*" See cases cited above in note to section 6.

When a life-interest in personal property terminates at any time *after* the first day of May, the life-tenant or his representatives must bear the *whole* tax for the year. *Holmes v. Taber*, 9 Allen 246.

*First Clause.* "*Other than where the owners reside.*" The fact that *one of several* partners owning the property resides in the town where it is situated, will not prevent the whole property from being taxed in that town under this provision of the statute. *Lee v. Templeton*, 6 Gray 579, 582.

"*Hire or occupy manufactories,*" &c. As to the meaning of this expression, see *Lee v. Templeton*, 6 Gray 579, 582. — *Field v. Boston*, 10 Cush. 65. — *Huckins v. Boston*, 4 Cush. 543.

It seems that this clause was never applicable to the property of corporations established under the laws of this commonwealth. *Boston and Sandwich Glass Co. v. Boston*, 4 Met. 181, 186. See also case cited in note to third clause. It is however applicable to property owned by a *foreign* corporation. *Blackstone Manuf. Co. v. Blackstone*, 13 Gray 488.

*Second Clause.* As to the original intention of this clause as affecting corporations, see *Boston and Sandwich Glass Co. v. Boston*, 4 Met. 181, 185.



*"All machinery," &c.* Gas pipes owned by a gas company, and used for distributing gas through the streets, and the meters used for measuring out the gas to the consumers, are to be regarded as such machinery. *Commonwealth v. Lowell Gas Light Co.*, 12 Allen 75.

*"And in assessing \* \* \* there shall first be deducted," &c.* This clause has no application to *foreign* corporations. *Dwight v. Mayor, &c.*, of Boston, 12 Allen 816, 822. — *Blackstone Manuf. Co. v. Blackstone*, 13 Gray 488, 491. The whole method of taxing *domestic* corporations has been altered by statute, and no assessment whatever is now made upon their stockholders. See below, under *"Additional provisions."*

*Third Clause.* This clause has no application to the property of a corporation established under the laws of this commonwealth. *Middlesex R.R. Co. v. Charlestown*, 8 Allen 330, 333. See also cases cited in note to first clause.

*Fourth Clause.* *"Where the ward is an inhabitant."* For a case where the ward was held to have changed his domicile, see *Kirkland v. Whately*, 4 Allen 462.

*Fifth Clause.* The term *"trustee"* in this clause is "a very general term, and includes any person who may be charged with the care and custody of a trust fund," even a receiver appointed for such a purpose by the circuit court of the United States. *Bates v. Boston*, 5 Cush. 93, 98.

*"If there are two or more executors, &c., residing in different places," &c.* It seems that such an apportionment would have been required prior to the existence of this provision, which first appears in the General Statutes. *Hardy v. Yarmouth*, 6 Allen 277, 285.

*"If the executor, &c., is not an inhabitant of this state," &c.* Prior to the insertion of this provision, which first appears in the General Statutes, the property in the case referred to was not taxable in this state. *Dorr v. Boston*, 6 Gray 131, 133.

*Sixth Clause.* As to what is *"an accumulating fund for the benefit of heirs," &c.*, see *Hathaway v. Fish*, 13 Allen 267.

*Seventh Clause.* As to the law prior to the Revised Statutes in the cases provided for by this clause, see *Cook v. Leland*, 5 Pick. 236.

If after the appointment of an administrator the personal property of the deceased is taxed, not to such administrator, but to the "estate of" the deceased, the tax cannot be collected of the administrator. *Wood v. Torrey*, 97 Mass. 321.

"*Until he gives notice,*" &c. The omission of the executors to give this notice, although the property has been actually distributed, defeats the right of the towns, in which the distributees live, to tax them, and even if such distributees return, in the towns in which they live, lists including the property so distributed, the tax thereon cannot legally be collected of them there. *Hardy v. Yarmouth*, 6 Allen 277, 283, 284.

As to the *kind of notice* required, see *Hardy v. Yarmouth*, 6 Allen 277, 282, 283.

As to the time when the estate is to be deemed to have been "*distributed and paid over,*" where the same parties are both executors of and trustees under the will of the deceased, see *Hardy v. Yarmouth*, 6 Allen 277, 280.

"*Before such appointment,*" &c. As to the law on this point prior to the enactment of this provision, see *Smith v. Northampton Bank*, 4 Cush. 1, 12, 13.

SECT. 13. As to the law prior to the enactment of this provision, see *Trustees, &c. v. Gloucester*, 19 Pick. 542.

Whether a ministerial fund held by trustees for the benefit of a religious society is to be considered as "*property held by a religious society*" within the meaning of this section, quære. See *Trustees of Greene Foundation v. Boston*, 12 Cush. 54, 59.

SECT. 14. This section *does not apply to mortgages or pledges of public or other stocks*, which are to be taxed to the mortgagor or pledgor, whoever may have possession of the certificates. The section applies only to "corporal, visible, and tangible property, of which either party may take open posses-

sion, and not to incorporal hereditaments or rights, which are incapable of such possession." *Waltham Bank v. Waltham*, 10 Met. 334, 338, 339, 340. — *Hall v. County Commissioners*, 10 Allen 100, 101.

SECT. 15. "*Places of business.*" As to what are such within the meaning of this section, see *Little v. Cambridge*, 9 Cush. 298, 300.

SECT. 16. For the cause of the enactment of this section, see *Peabody v. County Commissioners*, 10 Gray 97.

*Manner of Assessing Taxes.*

SECT. 17. Warrants to be sent by the treasurer, not to the sheriffs, but directly to the assessors by mail. St. 1867, c. 166.

SECT. 22. Act providing penalty for the return of false or fraudulent lists to assessors. St. 1869, c. 190.

Under this section lists are required of *corporations* as well as of individuals. *Otis Company v. Ware*, 8 Gray, 509, 511.

"*True lists,*" &c. As to the form of such lists, see *Charlestown v. County Commissioners*, 1 Allen 199, 202. It is not intended that such lists should contain a statement of the estimated value of the property. *Newburyport v. County Commissioners*, 12 Met. 211.

SECT. 23. "*Make oath that the same is true.*" As to the proper form of such oath, see *Charlestown v. County Commissioners*, 1 Allen 199, 203. Compare section 46 of this chapter.

SECT. 25. "*They shall receive as true.*" This means that they shall receive as true, not the appraisement or fixing of value contained in the list, but the enumeration, description, occupancy, and other particulars of the estate of the party bringing it in. *Lincoln v. Worcester*, 8 Cush. 55, 64. — *Newburyport v. County Commissioners*, 12 Met. 211, 223.

But a list is not to be received as true when it is shown not to be so by the answers of the party bringing it in, made by

him upon his examination in the mode provided in the latter part of this section. *Hall v. County Commissioners*, 10 Allen 100, 103.

SECT. 27. "*An estimate thereof.*" As to the degree of particularity required in such estimate, see *Tobey v. Wareham*, 2 Allen, 594, 596. — *Lincoln v. Worcester*, 8 Cush. 55, 63.

SECT. 31. "*Shall assess upon the polls, as nearly as may be, one-sixth part,*" &c. The omission to comply with this provision renders the whole tax illegal. *Gerry v. Stoneham*, 1 Allen 819. See also *Stone v. Bean*, 15 Gray 42. — *Goodrich v. Lunenburg*, 9 Gray 38.

"*Except highway taxes separately assessed.*" Money voted to be assessed by a city for "roads and bridges" has been held to constitute a "highway tax" within the meaning of this section. *Stone v. Bean*, 15 Gray 42. It is to be noted that this case arose prior to St. 1859, c. 157, which first inserted the words "separately assessed" into this provision.

"*Shall not exceed one dollar and fifty cents.*" Limit raised to two dollars by St. 1862, c. 158.

SECT. 33. "*Before the taxes assessed are committed for collection shall deposit,*" &c. In a case where the list was not deposited until *the day before* the taxes were committed to the collector, it was held that the statute was sufficiently complied with. *Tobey v. Wareham*, 2 Allen 594, 595.

The fact that neither the list nor an attested copy thereof was deposited in accordance with this section, will afford no defence to a collector in an action against him by a town to recover moneys actually collected by him. *Sandwich v. Fish*, 2 Gray 298; 299, 301.

SECT. 34. New form of valuation list prescribed by St. 1861, c. 167, s. 1, 2. See also St. 1864, c. 210. As to the effect of an omission in a valuation list, see *Torrey v. Millbury*, 21 Pick. 64.

SECT. 38. "*Tax list with their warrant,*" &c. A warrant without a tax list will not authorize a collector to collect a tax by

distress; but it is not necessary that the tax list should be annexed to the warrant. *Barnard v. Graves*, 13 Met. 85.

“*To the collector,*” &c. A warrant addressed to a person as “constable or collector,” such person being authorized to act as collector at the time of its delivery to him, although not at the time it bears date, will protect him from liability for his acts under it as collector. *Hays v. Drake*, 6 Gray 387.

SECT. 39. “*The warrant shall specify the duties,*” &c. Where the only defect in the warrant was an omission to direct the collector to sell distrained goods within seven days, he was held to be justified by such warrant in distraining goods and selling them according to law. *King v. Whitcomb*, 1 Met. 328. As to the effect of imperfections in the warrant, see further, *Barnard v. Graves*, 13 Met. 85. — *Reynolds v. New Salem*, 6 Met. 340, 345.

SECT. 41. If towns abuse the authority given them in this section “by making the discounts partial, the remedy is not by resisting the tax, but should be of a more general character. An injunction would seem to be appropriate.” *Tobey v. Wareham*, 2 Allen 594, 595.

SECT. 42. The remedy by bill in equity, does not exclude that by writ of entry. *Rand v. Robinson*, 11 Cush. 289.

SECT. 43. Assessors have no power to make an abatement after their term of office has expired. *Cheshire v. Howland*, 13 Gray 321, 323.

“When a person is liable to taxation for personal and real estate in a city or town, his *sole remedy* for an over-taxation caused by an excessive valuation of his property, or by including in the assessment property of which he is not owner, or for which he is not liable to taxation, is by an application to the assessors for an abatement.” *Osborn v. Danvers*, 6 Pick. 98. — *Bourne v. Boston*, 2 Gray 494, 496. — *Salmond v. Hanover*, 13 Allen 119. — *Howe v. Boston*, 7 Cush. 273. — *Lincoln v. Worcester*, 8 Cush. 55. — *Bates v. Boston*, 5 Cush. 93, 97. But this rule does not apply to the case of one who is taxed for

his poll and personal estate in a town in which he does not reside, although he is properly taxed for real estate which he owns in such town. *Preston v. Boston*, 12 Pick. 7. See also *Boston Water Power Co. v. Boston*, 9 Met. 199, 204. — *Torrey v. Millbury*, 21 Pick. 64.

Upon petition for abatement, taxes upon the same or other property of the petitioner cannot be increased. *Lowell v. County Commissioners*, 3 Allen 546, 549.

SECT. 46. This section, as well as the others relating to abatement of taxes, applies to *corporations* as well as to individuals. *Otis Company v. Ware*, 8 Gray 509, 510.

As to the purpose and theory of this section, see *Lincoln v. Worcester*, 8 Cush. 55, 63, 64.

*"Unless he has filed," &c.* That is, before the tax was assessed. *Porter v. County Commissioners*, 5 Gray 365. As to what constitutes the *filing* of a list, and whether such filing can be waived by the assessors, see *Winnisimmet Co. v. Assessors, &c.*, 6 Cush. 477. — *Lowell v. County Commissioners*, 3 Allen 546.

*"Oath that it is full and accurate according to his best knowledge and belief."* The oath need not have been administered in these exact words. *Charlestown v. County Commissioners*, 1 Allen 199, 203.

*"When such list is not filed within the time specified," &c.* Persons who do not bring in their lists within the time, and cannot "show a reasonable excuse" for their delay, to have no abatement on personal estate unless their tax exceeds the correct amount by more than fifty per cent, and then the abatement shall be only for the excess above such fifty per cent. St. 1865, c. 121.

*"Good cause why," &c.* As to what amounts to "good cause," see *Winnisimmet Co. v. Assessors, &c.*, 6 Cush. 477, 481. — *Lowell v. County Commissioners*, 3 Allen 546. Note also the mention of "reasonable excuse for not seasonably bringing in said list" in St. 1865, c. 121.

SECT. 48. "*Together with all charges.*" This does not include the petitioner's costs incurred in prosecuting his application for abatement. *Lowell v. County Commissioners*, 3 Allen 546, 550. Nor can the petitioner be allowed interest on the amount abated. *Lowell v. County Commissioners*, 3 Allen 550.

SECT. 50. This section repealed by St. 1865, c. 206, s. 2. By St. 1868, c. 211, s. 2, as amended by St. 1869, c. 443, a similar provision is made for assessing persons applying on or before the fifteenth day of September. For provision for assessment at any time of poll tax upon soldiers or sailors who have been within preceding two years engaged in military or naval service of the United States, see St. 1865, c. 68.

SECT. 51. The assessors of a town are not liable for assessing erroneously, but with integrity and fidelity, a tax on a person not an inhabitant thereof. *Durant v. Eaton*, 98 Mass. 469. — *Baker v. Allen*, 21 Pick. 382.

Neither can an action be maintained against the assessors by an individual, who is liable to taxation, for their omission to tax him, whereby he has lost his right to vote at an election, unless it is shown affirmatively that such omission was due to want of integrity or fidelity. *Griffin v. Rising*, 11 Met. 339.

But they are liable for assessing and issuing a warrant for the collection of a tax for a city or town, when such city or town is not legally organized. *Dickinson v. Billings*, 4 Gray 42. — *Withington v. Eveleth*, 7 Pick. 106. For a case in which, under an earlier statute, assessors were held liable for acts done upon an assessment made illegally, see *Inglee v. Bosworth*, 5 Pick. 498.

SECT. 52. Assessors are entitled to the statute compensation, although it exceeds the sum which the city or town may have voted, but they are not entitled to such sum and also to the statute compensation, unless it appears from the terms of the vote that the sum voted was intended to be additional. *Moody v. Newburyport*, 3 Met. 431.



See also *Howard v. Stevens*, 3 Allen 409. — *Eames v. Johnson*, 4 Allen 382.

*Reassessment of Taxes.*

SECT. 53. "*Invalid by reason of any error*," &c. As to the meaning of these words, see *Burr v. Wilcox*, 13 Allen 269, 271.

*Additional Provisions.*

Act to provide penalty for fraudulently evading taxation. St. 1864, c. 172.

Provision for assessing real or personal estate omitted in the annual taxation. St. 1868, c. 320.

Act requiring corporations established under laws of this state to make annual returns to assessors of certain stock and bonds held by them as collateral security. St. 1869, c. 444.

(Assessors to make on or before July 1st, alphabetical lists of all persons assessed for poll taxes. St. 1868, c. 211, s. 1. Repealed by St. 1869, c. 443.)

A new method of taxing corporations chartered under the laws of this state, except banks of issue and deposit, was established by St. 1864, c. 208, which statute has however been superseded by St. 1865, c. 283. This last named statute now forms the basis of the law relative to the taxation of such corporations. It has itself been amended by the following statutes: St. 1866, c. 291. — St. 1867, c. 52. — St. 1867, c. 188, s. 2. — St. 1867, c. 299. It has been held that these statutes are to be considered not *as imposing a tax on the property* of these corporations, but *as levying an excise on their franchises*. See *Commonwealth v. Lowell Gas Light Co.*, 12 Allen 75, 76. — *Commonwealth v. Hamilton Manuf. Co.*, 12 Allen 298, 300. They in terms exempt the shares of these corporations from taxation to the individuals owning them. See St. 1865, c. 283, s. 15. — St. 1866, c. 291, s. 2.

By St. 1865, c. 283, s. 7, 8, is also provided a method of taxing foreign *telegraph* companies owning, controlling, or using lines in this state, and foreign *mining* companies having offices in this state.

For provisions relative to the taxation of shares in *national and other banks*, see St. 1865, c. 242. — St. 1867, c. 188. — St. 1868, c. 349.

Shares in national banks situated in this state are legally taxable to stockholders residing here in the towns in which such stockholders reside. *Austin v. Boston*, 14 Allen 359. This decision has since been affirmed in the United States supreme court.

For provisions establishing the mode of taxation of *insurance companies and savings banks*, see St. 1862, c. 224. — St. 1863, c. 164. — St. 1864, c. 208, s. 7. — St. 1865, c. 267. — St. 1865, c. 283, s. 18. — St. 1867, c. 160. — St. 1868, c. 315.

## CHAPTER XII.

### OF THE COLLECTION OF TAXES.

SECT. 1. A tax warrant good upon its face protects the collector acting under it, notwithstanding any irregularity at the meetings at which or [the votes by which the taxes were assessed. *Howard v. Proctor*, 7 Gray 128, 133.

SECT. 6. This section applies to a case where the error in the name exists both in the valuation list and in the assessors' warrant to the collector. The statute covers all cases of error in the name, and was intended to apply to a case where the name is mistaken by omitting, as well as by adding or by misnaming. *Tyler v. Hardwick*, 6 Met. 470, 474. See also *Wood v. Torrey*, 97 Mass. 321, 323.

As to the effect of a mistake in the name upon a sale or conveyance of land by a collector for non-payment of taxes, see *Sargent v. Bean*, 7 Gray 125.

SECT. 7. The distress cannot be made after the death of the person upon whom the tax is assessed. *Wilson v. Shearer*, 9 Met. 504, 506.

SECT. 8. "*Within seven days.*" In the case of a seizure

of bank shares, it was held that if the return of the tax warrant showed that the sale was made twenty days after the seizure, the bank was not bound to issue a certificate of stock to the purchaser, as the owner's title was not divested. *Noyes v. Haverhill*, 11 Cush. 338.

*"By posting up a notification."* A notification of a sale of a horse was held to be good, although it did not mention the owner's name, or describe the horse, or state the amount of the tax. The notification may be posted before the expiration of four days from the seizure. *Barnard v. Graves* 13 Met. 85.

The return made by a collector on his warrant is so far an official act as to be *prima facie* evidence in his favor on the trial of an action against him for making the distress, and a demand by him before he made the distress may be shown by his return. *Barnard v. Graves*, 13 Met. 85.

SECT. 11. As to how far a corporation ought to investigate the regularity of the proceedings before issuing a new certificate of shares, see *Smith v. Northampton Bank*, 4 Cush. 1, 10.

SECT. 12. *"Charges of keeping and sale."* The collector may charge for his own compensation a commission or percentage on the amount of the tax. *Howard v. Proctor*, 7 Gray 128. See St. 1862, c. 183, s. 10.

SECT. 13. *"Cannot find sufficient goods," &c.* See *Snow v. Clark*, 9 Gray 190, 193. — *Lothrop v. Ide*, 13 Gray 93, 95. — *Hall v. Hall*, 3 Allen 5.

SECT. 15. Further provision as to discharge of persons committed to prison for non-payment of taxes. St. 1862, c. 183, s. 9.

SECT. 16. *"The charges of imprisonment."* These do not include the cost of the support of the person while imprisoned. *Townsend v. Walcutt*, 3 Met. 152.

SECT. 18. *"Removes out of the precinct."* If a person leaves the precinct with the intention of returning at the expiration of six months, it is a removal within the meaning of this section. *Houghton v. Davenport*, 23 Pick. 235.

"*The collector may issue his warrant to the sheriff.*" As to the proper form for such warrant, see *Cheever v. Merritt*, 5 Allen 563. — *Williamstown v. Willis*, 15 Gray 427.

SECT. 19. A collector of taxes cannot maintain an action to recover them in any case except as provided in this section. *Crapo v. Stetson*, 8 Met. 393.

SECT. 22. "*Shall constitute a lien thereon,*" &c. In the case of a tax assessed to a mortgagor in possession, the lien extends to the whole estate, and a sale for non-payment passes to the purchaser not only the equity of redemption, but also the rights of the mortgagee, except as provided in Gen. St. c. 12, s. 24, 25, 36. *Parker v. Baxter*, 2 Gray 185.

SECT. 29. "*A substantially accurate description.*" See *Farnum v. Buffum*, 4 Cush. 260, 265.

"*The amount of the tax.*" If the amount of the tax is not accurately stated, the sale will be void. *Alexander v. Pitts*, 7 Cush. 503.

SECT. 33. Under the corresponding section of the Revised Statutes it was held that a tax title was not valid unless it appeared by the collector's deed, or otherwise, that the land was so divided that no greater portion thereof was sold than was necessary to satisfy the tax and intervening charges, or that it could not be conveniently divided to that extent. *Crowell v. Goodwin*, 3 Allen 535. But it seems that the rule is now different under the General Statutes. See same case p. 537.

In certain cases the collector may purchase lands at tax sales for the city or town assessing the tax, and if the purchaser at a tax sale fails to pay, &c., within ten days, such city or town is to be deemed the purchaser, &c., &c. St. 1862, c. 183, s. 1-8.

"*After satisfying the taxes and charges.*" Such charges fixed by St. 1862, c. 183, s. 10. As to the legal fees of collectors prior to this statute, see *Converse v. Jennings*, 13 Gray 77.

SECT. 35. "*Which deed shall state,*" &c. The deed shall contain a "special warranty that the sale has in all particulars

been conducted according to the provisions of law," and if the purchaser's title proves invalid the town shall refund to him the money paid with ten per cent interest. St. 1862, c. 183, s. 6. Prior to this statute a purchaser at a tax sale, whose title proved invalid, had no remedy against the town. *Lynde v. Melrose*, 10 Allen 49.

The deed of a collector "should be construed with some strictness" with regard to the description of the premises sold, and if it fails in that particular, will be void. *Hill v. Mowry*, 6 Gray 551, 552.

"*The cause of sale.*" If this be not stated in full, the deed will be void, — for instance if it be not stated in the deed that the taxes were not paid within fourteen days. *Harrington v. Worcester*, 6 Allen 576.

"*Such deed to be valid shall be recorded,*" &c. This provision was first made by St. 1848, c. 166, s. 5. It seems that the recording of such a deed was a requisite to its validity independent of statute provision. *Tilson v. Thompson*, 10 Pick. 359, 363.

*It seems* that a collector's deed will not convey a good title unless the land has been taxed to the true owner, or to the occupant, or to "owners unknown." See *Sargent v. Bean*, 7 Gray 125.

As to the effect of a tax sale upon the rights of a mortgagee, see *Parker v. Baxter*, 2 Gray 185.

SECT. 36. Provision for sale, after two years from tax sale, of lands purchased by a city or town at such sale, the proceeds to be deposited for five years in the city or town treasury for the benefit of the owner of the lands. St. 1862, c. 183, s. 7.

"*The owner,*" &c. This includes one who is in possession under a bond for a deed. *Rogers v. Rutter*, 11 Gray 410.

*A writ of entry* will lie by the former owner of land against the purchaser at a tax sale, after a tender made according to the provisions of this section. *Rand v. Robinson*, 11 Cush. 289.

"*By paying or tendering to the purchaser or his heirs or assigns.*" If, while the premises are held by one claiming adversely to him, the purchaser gives a deed of them to a third party, the grantee in such deed will not thereby become entitled to have the payment or tender made to him, but it must still be made to the original purchaser. *Faxon v. Wallace*, 98 Mass. 44.

"*Fourth. Mortgagees of record.*" An assignee of a mortgage stands on the same footing as the original mortgagee. *Faxon v. Wallace*, 98 Mass. 44.

SECT. 40. See *Andrews v. Worcester County Mut. Fire Ins. Co.*, 5 Allen 65.

SECT. 52. A selectman and assessor of a town may legally be chosen collector also. *Howard v. Proctor*, 7 Gray 128.

*Recovery of Taxes Collected.*

SECT. 56. See *Lee v. Templeton*, 13 Gray 476.

*Additional Provisions.*

Act authorizing interest, at a rate not exceeding one per cent a month, to be added to unpaid taxes in certain cases. St. 1862, c. 146.

---

## TITLE IV.

UNDER this title seems to be the most appropriate place for noting the following statutes:—

Acts relative to bounties to volunteers. St. 1863, c. 254.—St. 1864, c. 48, 65, 84, 130, 143, 211, 232, 292, 313.—St. 1865, c. 151, 180, 274.—St. 1866, c. 84, 139.

Acts to promote enlistments and regulate recruiting. St. 1863, c. 91, 222, 252, 254.—St. 1864, c. 78.—St. 1865, c. 148.

Acts to authorize the formation of a state guard. St. 1863, c. 167.—St. 1866, c. 189, 219.

Act relative to preserving a record of our soldiers and officers. St. 1863, c. 65, 229.

Act concerning the apprehension of deserters and drafted men. St. 1863, c. 155.

Acts to provide for the instruction and discipline of a military force. St. 1861, c. 219. — St. 1862, c. 221. — St. 1865, c. 154.

Act relative to the coast defences of Massachusetts. St. 1863, c. 118.

### CHAPTER XIII.

#### OF THE MILITIA.

This chapter was wholly repealed and superseded by St. 1864, c. 238. Prior to its repeal it had been amended by St. 1861, c. 49. — St. 1861, c. 143. — St. 1862, c. 111. — St. 1862, c. 167, s. 1. — St. 1862, c. 214. — St. 1863, c. 17. — St. 1863, c. 181. — St. 1863, c. 193. — St. 1863, c. 243. — St. 1864, c. 15.

The militia law of 1864 (St. 1864, c. 238), having been amended by St. 1865, c. 19, and St. 1865, c. 250, was itself repealed and superseded by St. 1866, c. 219.

The present militia law of the state is to be found in St. 1866, c. 219, as amended by St. 1866, c. 226. — St. 1866, c. 259. — St. 1867, c. 100. — St. 1867, c. 266. — St. 1867, c. 309. — St. 1868, c. 234. — St. 1869, c. 205. — St. 1869, c. 332.

For the "rules and articles for governing the troops of the commonwealth and the militia *in actual service*," see St. 1864, c. 301.

## TITLE V.

## OF CERTAIN STATE OFFICERS AND MATTERS OF FINANCE.

OFFICES of all departments of the state government to be open daily, except on Sundays and legal holidays, during such hours as the governor and council may direct. St. 1866, c. 67.

## CHAPTER XIV.

## OF CERTAIN STATE OFFICERS.

*Governor, Lieutenant-Governor, and Councillors.*

SECT. 1. Salary of governor raised to \$5,000 a year. St. 1864, c. 240.

Resolve establishing office of private secretary of the governor. Resolves 1861, c. 1. His salary fixed at \$2,000 per annum by St. 1866, c. 298, s. 4.

SECT. 1, 2. Authorization and ratification of certain acts of the governor and council for the maintenance of the union and the constitution. St. 1861, c. 216. — St. 1861, c. 217. — St. 1861, c. 218. — St. 1862, c. 147. — St. 1864, c. 98.

*Secretary.*

SECT. 3. Salary for 1864 to be \$2,500. St. 1864, c. 300. Same for 1865. St. 1865, c. 247, s. 4. Fixed at \$2,500 per annum by St. 1866, c. 298, s. 3.

Further acts relative to returns of fees. St. 1862, c. 109, s. 4. — St. 1863, c. 231, s. 4. — St. 1865, c. 157, s. 2.

SECT. 4. Salary of chief clerk raised to \$1,800 by St. 1865, c. 247, s. 5. Further raised to \$2,000 by St. 1866, c. 298, s. 5.

Salary of second clerk raised to \$1,400 for year 1865 by St. 1865, c. 247, s. 5. See St. 1866, c. 298, s. 5.

Salary of messenger raised to \$1,000 by St. 1866, c. 298, s. 4.



SECT. 6-9. Secretary to send notice by mail to justices of the peace and notaries public of the expiration of their commissions. St. 1866, c. 231.

SECT. 8. Repealed by St. 1869, c. 365. (Act fixing fees for passports or certificates of citizenship. St. 1865, c. 157.)

*Attorney-General and District-Attorneys.*

SECT. 16. Salary of attorney-general raised to \$3,500. St. 1866, c. 298, s. 2. Allowance for clerical assistance repealed by St. 1868, c. 93, s. 3.

Office of assistant attorney-general established by St. 1868, c. 93.

SECT. 17. As to whether the attorney-general has a right for good cause to avail himself of the aid of other suitable counsel, see *Commonwealth v. Boston & Maine R.R.*, 3 Cush. 25, 48. — *Parker v. May* and others, 5 Cush. 336. See also Gen. St. c. 14, s. 25.

SECT. 20. On an information to enforce a trust for purposes of general charity, the attorney-general is not obliged to appear personally, but he may appear and conduct the cause by other counsel. *Parker v. May*, 5 Cush. 336.

By the common law the public prosecutor has power to institute proceedings for the enforcement of a public charity. *Parker v. May*, 5 Cush. 336.

SECT. 22. The attorney-general shall, when requested, advise and consult with trustees and treasurers of state lunatic hospitals. St. 1862, c. 223, s. 12.

SECT. 25. Under this section the court may appoint a district-attorney pro tempore when the office is *vacant*. *Commonwealth v. King*, 8 Gray 501.

"*Some suitable person.*" A counsellor is not a suitable person to be appointed on a criminal case, if he has previously been employed in a civil case depending upon the same state of facts. *Commonwealth v. Gibbs*, 4 Gray 146.

SECT. 27. See *Commonwealth v. Rogers*, 9 Gray 278, 281.

SECT. 17-23. Attorney-general to appear for commissioners of public lands in certain cases. St. 1866, c. 264, s. 3.

SECT. 29. Salaries of district-attorneys altered by St. 1867, c. 349, s. 1. Made payable monthly on first day of each month. St. 1868, c. 4. No extra fees to be paid to district-attorneys. Court may in certain cases allow for services of a clerk to aid district-attorney or for other assistance. St. 1860, c. 191, s. 9.

SECT. 31. District-attorneys, when requested, to advise and consult with trustees and treasurers of state lunatic hospitals. St. 1862, c. 223, s. 12.

As to the power of a district-attorney to authorize a third person to act for him in a suit in behalf of the commonwealth, see *Commonwealth v. Conn. River R.R.* 15 Gray 447, 449. — *Commonwealth v. Boston & Maine R.R.*, 3 Cush. 25, 48. See also Gen. St. c. 14, s. 33.

SECT. 32. "An act to authorize the district-attorney for Suffolk county to appoint a clerk." St. 1869, c. 373.

*Commissioners to Administer Oaths to Public Officers.*

SECT. 40. Such commissioners, upon qualifying any officer, to make return to secretary of the commonwealth. St. 1862, c. 109, s. 3.

*Commissioners to take Depositions, &c.*

SECT. 41-44. Act fixing the fees of such commissioners. St. 1862, c. 76.

*Commissioners to take Acknowledgments, &c.*

SECT. 45-47. Act fixing the fees of such commissioners. St. 1862, c. 76.

*Sergeant-at-Arms.*

SECT. 49. The sergeant-at-arms may appoint assistant in case of disability or absence. St. 1863, c. 87.

SECT. 50. Salary raised to \$2,200. St. 1867, c. 167, s. 2. Raised farther to \$2,500. St. 1867, c. 305.

SECT. 59. Salary of watchmen raised to \$1,200. St. 1867, c. 167, s. 2.

SECT. 60. Salary of fireman raised to \$700. St. 1867, c. 167, s. 2.

*Additional.* Sergeant-at-arms to appoint an engineer, assistant-watchman, and two firemen. St. 1868, c. 341.

*Messenger to the Governor and Council.*

SECT. 63. Salary of messenger raised to \$1,200. St. 1866, c. 298, s. 4. Reduced to \$1,000. St. 1867, c. 167, s. 7.

Salary of assistant-messenger raised to \$800. St. 1867, c. 167, s. 7.

*Provisions relative to certain other Officers.*

Establishment of board of harbor commissioners. St. 1866, c. 149. See also St. 1867, c. 190, s. 3.

Vacancies in office of state director of any corporation and in certain other offices, how filled. St. 1860, c. 216.

Acts concerning the issue of commissions to certain civil officers. St. 1862, c. 109. — St. 1867, c. 138.

Employees of the state government not to receive fees for their own use. St. 1865, c. 259, s. 3.

Salary of adjutant-general fixed at \$2,500 for year 1864. St. 1864, c. 300. Same for 1865. St. 1865, c. 247, s. 3. Fixed permanently at \$2,500 by St. 1866, c. 298, s. 3.

Salary of chief clerk of adjutant-general fixed at \$1,800 by St. 1865, c. 247, s. 5. Raised to \$2,000 by St. 1866, c. 298, s. 5.

Salary of messenger to the adjutant-general's department fixed at \$600 by St. 1867, c. 167, s. 5.

Extra clerks in the several departments at the state-house to have salaries not exceeding \$1,300 each. St. 1867, c. 167, s. 6.

## CHAPTER XV.

## OF THE AUDITOR, TREASURER, LAND AGENT, AND MATTERS OF FINANCE.

*Auditor.*

SECT. 1-8. These sections were repealed and superseded by St. 1867, c. 178. [Prior to this statute of 1867 the salaries of the auditor and his clerks had been altered by the following statutes: St. 1862, c. 77. — St. 1864, c. 300. — St. 1865, c. 247, s. 2, 5. — St. 1866, c. 298, s. 3, 5. — St. 1867, c. 167, s. 6. By St. 1866, c. 101, he was authorized to employ a second clerk at a salary of \$1,400.]

*Treasurer.*

SECT. 12. Salary fixed at \$2,500 for year 1864. St. 1864, c. 300. Raised to \$3,000 by St. 1865, c. 247, s. 1. Raised further to \$3,500 by St. 1866, c. 298, s. 1.

Salary of first clerk fixed at \$2,000 for year 1864. St. 1864, c. 300. Raised to \$1,800 by St. 1865, c. 247, s. 5. Raised further to \$2,000 by St. 1866, c. 298, s. 5. To \$2,200 by St. 1867, c. 167, s. 6. And to \$2,500 by St. 1869, c. 454.

Salary of second clerk raised to \$1,600 by St. 1865, c. 247, s. 5.

Salary of "first-assistant clerk and cashier" fixed at \$1,700. St. 1866, c. 298, s. 5.

As to salaries of additional clerks, see St. 1866, c. 298, s. 6. — St. 1867, c. 167, s. 6.

SECT. 15. This section repealed by St. 1868, c. 280.

SECT. 13-22. *Additional duties of Treasurer.* [Authorized to guarantee treasury bonds of United States to amount of \$2,000,000. St. 1861, c. 43. Repealed by St. 1861, c. 212.]

Authorized and required to receive and distribute allotment money of Massachusetts volunteers in United States service.

St. 1862, c. 62. Similar provision as to claims for pay. St. 1863, c. 58, s. 2. See also St. 1863, c. 254, s. 4.

*Commissioners on Public Lands.*

SECT. 23. Office of land agent abolished and duties transferred to the commissioners on the back bay, who thereafter to be known as the commissioners on public lands. St. 1861, c. 85.

SECT. 24-27. *Additional duties.* Commissioners on public lands may be compelled in equity to remove buildings, &c., on the back bay or on public lands. St. 1866, c. 264.

*Matters of Finance.*

SECT. 30. See St. 1867, c. 178, s. 4. Also Opinion of Justices, 13 Allen 593.

SECT. 33. See *Lowell v. Oliver*, 8 Allen 247, 251, 258.

SECT. 36. Salaries to be payable *monthly*. (St. 1861, c. 87.) — St. 1867, c. 263. — St. 1868, c. 4.

See *Lord v. County of Essex*, 98 Mass. 484.

SECT. 37. This section repealed and superseded by "An act to provide for proper auditing of legislative expenses." St. 1869, c. 309.

SECT. 44. (This section made applicable to bills of certain state institutions. St. 1862, c. 51.) Afterwards repealed and superseded by St. 1867, c. 178, s. 3, 14. See also St. 1862, c. 101, s. 3.

*Certain other Matters of Finance.*

Act relating to payment of fees of witnesses before the general court. St. 1860, c. 41.

Reimbursement to towns of portion of sums paid by them to families of volunteers. St. 1861, c. 222, s. 5-7. — St. 1862, c. 66, s. 4-6. — St. 1862, c. 166, s. 4. — St. 1863, c. 79, s. 3.

State to be responsible to volunteers in United States service on certain conditions. St. 1863, c. 58, s. 1.

Auditing officers may require claimants to make oath to certain facts. St. 1862, c. 101, s. 3.

Civil actions to recover money to the use of the commonwealth, how to be brought. St. 1866, c. 233, s. 2.

Establishment of a *sinking fund*. St. 1861, c. 209. — St. 1862, c. 80. — St. 1864, c. 313. — St. 1868, c. 165. — St. 1868, c. 339.

Establishment of *union fund*. St. 1861, c. 216. — St. 1861, c. 217. — St. 1862, c. 147. — St. 1862, c. 167, s. 2. — St. 1864, c. 198.

Establishment of *bounty fund*. St. 1863, c. 91. — St. 1864, c. 313. — St. 1865, c. 32.

Establishment of *Massachusetts war fund*. St. 1865, c. 122. — St. 1865, c. 284. — St. 1869, c. 91. — St. 1869, c. 293.

Mode of investment of state funds. Annual examination of state securities. St. 1862, c. 187.

Appropriations from incomes of certain funds. St. 1862, c. 83.

Securities, instead of being sold, may be transferred to other funds. St. 1868, c. 71.

Principal and interest of scrip or bonds of the commonwealth to be paid in coin. St. 1862, c. 82.

Issue of scrip for coast defences. St. 1863, c. 118.

Issue of registered bonds. St. 1867, c. 255.

Issue of currency bonds. St. 1867, c. 304.

Certain state scrip may be hypothecated as governor and council deem expedient, and agents may be appointed to sell, dispose of, or hypothecate the same in Europe. St. 1869, c. 201, s. 1.

## CHAPTER XVI.

### OF THE STATE BOARD OF AGRICULTURE.

SECT. 1. The president of the agricultural college to be a member of the board. St. 1866, c. 263, s. 3. (Certain other agricultural societies entitled to appoint members of state

board of agriculture. St. 1866, c. 189, s. 2. Repealed by St. 1869, c. 128.)

SECT. 3. May meet at the state agricultural college. St. 1866, c. 263, s. 2.

SECT. 4. Salary of secretary raised to \$2,000. St. 1867, c. 167, s. 4.

Secretary authorized to employ one clerk at salary not exceeding \$1,100. St. 1869, c. 96, s. 1.

Also authorized to expend for other clerical services in his office and for lectures before the board of agriculture a sum not exceeding \$400. St. 1869, c. 96, s. 2. (See prior laws. St. 1865, c. 243. — St. 1862, c. 164.)

SECT. 5-7. *Duties of board.* May fix days for the annual exhibitions of agricultural societies. St. 1866, c. 189, s. 3.

To be overseers of the Massachusetts agricultural college, and may locate state agricultural cabinet and library at said college. St. 1866, c. 263, s. 1, 2.

---

## TITLE VI.

---

### CHAPTER XVII.

#### OF COUNTIES AND CERTAIN COUNTY OFFICERS.

SECT. 1. The territory comprised within the limits of the city of Roxbury taken from the county of Norfolk and made part of the county of Suffolk by St. 1867, c. 359, which act, for this purpose, took effect on the first Monday (6th) of January, A.D. 1868. See section 12 of that statute.

The territory comprised within the limits of the town of Dorchester taken from the county of Norfolk and made part of the county of Suffolk by St. 1869, c. 349, which act, for

this purpose, takes effect on the first Monday (3d) of January, 1870. See sections 1 and 12 of that statute.

SECT. 10. Courts of Suffolk and Plymouth to have jurisdiction of offences in Hull. St. 1863, c. 177.

SECT. 12. The fact that a county commissioner is a taxable owner of real estate in the town in which a road is prayed for, does not make him disqualified to act. *Danvers v. County Commissioners*, 2 Met. 185.

Neither is a commissioner disqualified to act by reason of being an inhabitant of a town, to the line of which the road in question extends, and in which the road is continued. *Monterey v. County Commissioners*, 7 Cush. 394.

The proceedings of a board not organized according to the provisions of this section will be quashed, if seasonably excepted to. *Danvers v. County Commissioners*, 2 Met. 185. — *Tolland v. County Commissioners*, 13 Gray 12.

SECT. 13. Unless the contrary is shown it will be presumed that the proceedings of county commissioners have not violated the provisions of this section. *Walker v. Boston & Maine R.R.*, 3 Cush. 1, 19.

When, pursuant to this section, it is necessary that the commissioners should act in the final determination of a matter, it is also necessary that all the commissioners so acting should have heard the evidence in the case. *Joslyn v. County Commissioners*, 15 Gray 567.

SECT. 16. County commissioners may establish a county seal. St. 1862, c. 157.

May establish houses of reformation, &c. St. 1865, c. 208, s. 2-4.

County commissioners of Plymouth county may purchase, sell, or lease certain lands in Hull. St. 1864, c. 45.

SECT. 18. See *District Attorney v. County Commissioners of Bristol*, 14 Gray 138.

SECT. 29. Salaries of county commissioners altered by (St. 1860, c. 185. — St. 1864, c. 280, s. 1). — St. 1867, c. 340.



SECT. 31. *Middlesex.* Meeting appointed to be held at Concord on first Tuesday of June, to be held at Cambridge. St. 1867, c. 341.

*Berkshire.* Meetings for this county to be held at Pittsfield on the first Tuesdays of April, July, and September, and on the last Tuesday of December. St. 1868, c. 325, s. 3. (Prior change by St. 1860, c. 3.)

Act authorizing county commissioners to adjourn an established meeting from one shire town to another in the same county. St. 1869, c. 208.

*County Treasurers.*

SECT. 37. Salaries altered by St. 1867, c. 278. — St. 1868, c. 92.

SECT. 39-43. Further duties of county treasurers. St. 1864, c. 280, s. 2-4.

*Board of Examiners.*

SECT. 48. Further duties of board of examiners. St. 1864, c. 280, s. 5.

*Board of Accounts in Suffolk.*

SECT. 50. This section repealed and superseded by St. 1866, c. 117.

*Sheriffs.*

SECT. 51. "*And be responsible for all his deputies.*" A sheriff will be responsible for money actually received by his deputy upon a process committed to him for service, although such process be void upon its face. *Williamstown v. Willis*, 15 Gray 427, 430.

When a deputy sheriff, upon receiving a writ for service, is authorized to settle the suit by receiving money or in any other particular way, if he acts in a settlement, he acts not in his official character but as the special agent of the plaintiff, and the sheriff is not answerable for his wrongful or unauthorized act as such agent. But if the deputy does not act in strict pursuance of his authority, as for instance if, being authorized

to take in settlement an order upon a particular person for a certain amount, he receives such amount in money, the sheriff will be answerable for his default in not paying over such money to the plaintiff. *Hammond v. Root*, 15 Gray 516.

SECT. 60. "*In a civil action.*" As to the commitment of a sheriff in a criminal process, see *Adams v. Vose*, 1 Gray 51, 60.

SECT. 63. As to how far a sheriff's liability extends in case his deputy is reappointed by his successor, see *Blake v. Shaw*, 7 Mass. 505. — *Larned v. Allen*, 13 Mass. 295.

SECT. 64. See section 40 of chapter 121 and notes to the same.

SECT. 65. Exception as to service of criminal process in *Hull*. St. 1864, c. 50.

As to whether a deputy-sheriff can serve a writ in behalf of a bank, when he is a member of the corporation, see *Merchants' Bank v. Cook*, 4 Pick. 405.

SECT. 66. For purpose of this section see note of Commissioners on General Statutes upon it.

SECT. 70. Salaries of sheriffs changed by St. 1861, c. 114. — St. 1866, c. 298, s. 11. — St. 1867, c. 345.

Sheriff, when performing duties of jailer or of master of house of correction, entitled to additional compensation. St. 1860, c. 92.

#### *Coroner.*

SECT. 74, &c. Special coroners for each county to be appointed by the governor. St. 1861, c. 113, s. 1.

Commissions of coroners and special coroners to be for the term of seven years. St. 1862, c. 172.

Coroners, other than special, not to be required to give bond of over \$500. St. 1861, c. 113, s. 2.

SECT. 78. The service of writs by a coroner, being by virtue of a special authority and not coming within the general duties of that officer, all the facts necessary to give him the power should appear in the writ itself. Although the power does not appear affirmatively, still, if the contrary does not appear, the de-

fendant will be deemed to have waived the defect unless he takes exception in due season. *Carlisle v. Weston*, 21 Pick. 535. — *Simonds v. Parker*, 1 Met. 508.

“*All writs and precepts.*” These include warrants and processes in criminal cases. *Adams v. Vose*, 1 Gray 51, 57.

SECT. 78–80. These sections made applicable only to special coroners. St. 1861, c. 113, s. 2.

*Registers of Deeds.*

SECT. 82. The registry of deeds for the middle district of Berkshire removed from Lenox to Pittsfield. St. 1868, c. 325, s. 5.

SECT. 83. The town of Acushnet to be a part of the southern district of the county of Bristol. St. 1861, c. 23.

SECT. 84. The town of Littleton set off from the northern to the southern district of the county of Middlesex. St. 1860, c. 162.

SECT. 85. The county of Essex divided into two districts by St. 1869, c. 445. — St. 1869, c. 455.

SECT. 87. In case of death or disability of register, his clerk shall act till vacancy is filled or disability removed. St. 1863, c. 200, s. 2.

When upon death or removal of a register, deeds are left unrecorded, or deeds or records unattested, such deeds or records to be recorded by his successor. St. 1863, c. 200, s. 1, 3.

SECT. 94. Registers to note upon the record of any instrument the value of any stamp affixed thereto and the cancellation thereof. St. 1863, c. 225.

*Additional provisions.* Receipts of United States collectors of internal revenue for succession taxes, or other evidence of the payment of such taxes, to be recorded by registers of deeds. St. 1868, c. 132.

Assignments in bankruptcy under United States bankruptcy law of 1867 to be recorded by registers of deeds. St. 1868, c. 282.

Provision for noting assignments, &c., &c., of mortgages in

margin of original mortgage, where such mortgage is not recorded in the same registry. St. 1868, c. 197.

Register of deeds for Dukes county to receive salary of \$200 in addition to his fees. St. 1865, c. 114.

Register for Nantucket county to receive salary of \$300 in addition to his fees. St. 1866, c. 151.

---

## TITLE VII.

### OF TOWNS AND CITIES.

---

## CHAPTER XVIII.

### OF THE POWERS OF TOWNS, AND THE ELECTION, QUALIFICATION, AND DUTIES OF TOWN OFFICERS.

#### *Powers and Duties of Towns.*

SECT. 2. Change of town lines of Chelmsford and Carlisle. St. 1865, c. 34.

Change of town lines of Marion and Wareham. St. 1865, c. 73.

Part of Salem annexed to Swampscott. St. 1867, c. 124.

Establishment of boundary line between Taunton and Lakeville. St. 1867, c. 352.

Union of cities of Boston and Roxbury. St. 1867, c. 359.

Union of city of Boston and town of Dorchester. St. 1869, c. 349.

Union of city of Haverhill and town of Bradford. St. 1869, c. 388.

Town of Hudson formed out of portions of Marlborough and Stow. St. 1866, c. 82, 194.

Town of Hyde Park formed out of portions of Dorchester, Dedham, and Milton. St. 1868, c. 139.

Name of West Cambridge changed to Arlington. St. 1867, c. 148.

Name of South Reading changed to Wakefield. St. 1868, c. 32.

Name of South Danvers changed to Peabody. St. 1868, c. 121.

SECT. 5. Stone monuments to be placed wherever town lines cross highways. St. 1861, c. 84.

SECT. 8. "*May appoint all necessary agents,*" &c. As to the proper mode of such appointment, see *Walpole v. Gray*, 11 Allen 149.

SECT. 9. Act authorizing cities and towns to take land for the erection of a city or town hall, or for the enlargement of a city or town hall lot. St. 1869, c. 411.

Cities and towns may construct for their own use lines of electric telegraph upon and along the highways and public roads within their respective limits, &c. St. 1869, c. 457.

Towns may in certain cases receive, hold, and sell tax titles. St. 1862, c. 183.

Towns may take and hold devises and bequests for appropriate charitable uses. *Drury v. Natick*, 10 Allen 169, 182.

"*May convey the same either by a vote,*" &c. It has always been held in Massachusetts that towns might convey their lands by *vote* without *deed*. *Gloucester v. Gaffney*, 8 Allen 11, 13. — *Green v. Putnam*, 8 Cush. 21, 25. — *Springfield v. Miller*, 12 Mass. 415, 416. — *Codman v. Winslow*, 10 Mass. 146. — *Baker v. Fales*, 16 Mass. 488, 497. — *Thomas v. Marshfield*, 10 Pick. 364, 367. — *Damon v. Granby*, 2 Pick. 345, 352. — *Adams v. Frothingham*, 3 Mass. 352, 360. As to the validity of any deed by a town or its agent prior to the Revised Statutes, see *Damon v. Granby*, 2 Pick. 345, 352.

SECT. 10. "*At legal meetings.*" These include *special* meetings as well as the regular annual meetings. *Freeland v. Hastings*, 10 Allen 570, 590.

"*For the following purposes.*" The purposes for which money is raised must be specified in the vote to raise it, or otherwise declared or made known at the time when such vote is passed. *Freeland v. Hastings*, 11 Allen 570, 576. — *Woodbury v. Hamilton*, 6 Pick. 101, 102.

*"For the support of town schools."* For a case in which a female high-school was held to be a town school, see *Cushing v. Newburyport*, 10 Met. 508.

*"For all other necessary charges arising therein."* It has been held that a town might grant money to build a market house (*Spaulding v. Lowell*, 23 Pick. 71); to repair fire-engines used for extinguishing fires, whether such engines belonged to the town or were purchased by private subscription (*Allen v. Taunton*, 19 Pick. 485); to construct reservoirs for water to supply the fire-engines (*Hardy v. Waltham*, 3 Met. 163); to repair a public clock (*Willard v. Newburyport*, 12 Pick. 227); and to repair a meeting-house as a compensation for its use for municipal purposes. *Woodbury v. Hamilton*, 6 Pick. 101.

A town may raise money to indemnify its officers against liabilities incurred in the bona fide discharge of their duties. *Fuller v. Groton*, 11 Gray 340, and cases there cited. Also *Babbitt v. Savoy*, 3 Cush. 530. But see *Vincent v. Nantucket*, 12 Cush. 103.

A town has no authority in time of war and danger of hostile invasion to raise money to give additional pay to the militia and for other purposes of defence. *Stetson v. Kemp-ton*, 13 Mass. 272.

A town has no authority to appropriate money for the celebration of the Fourth of July. *Hood v. Lynn*, 1 Allen 103. Nor of the anniversary of the surrender of Cornwallis. *Tash v. Adams*, 10 Cush. 252. See however St. 1861, c. 165, which authorizes *cities* to make such appropriations.

Nor has a town authority to appropriate money for the purchase of uniforms for a military company. *Claffin v. Hopkinton*, 4 Gray 502.

Nor for the payment of expenses incurred by individuals in procuring the passage of the charter of the town. *Frost v. Belmont*, 6 Allen 152.

Nor to distribute money in the treasury among those liable to a poll tax in the town. *Allen v. Marion*, 11 Allen 108.

Nor to appropriate it to the payment of poll taxes. *Cooley v. Granville*, 10 Cush. 56.

As to the constitutional limits of the power of the legislature to authorize towns to raise money, see *Freeland v. Hastings*, 11 Allen 570, 576.

Towns may raise and appropriate money for conveyance of pupils to and from the public schools. St. 1869, c. 132.

Towns may raise money for the purpose of procuring the detection and apprehension of persons committing felonies. St. 1869, c. 206.

Towns may raise money to encourage the growth of shade-trees. St. 1869, c. 381.

Acts authorizing towns to raise money in aid of disabled soldiers and sailors, and of the families of soldiers and sailors in the service of the United States. (St. 1861, c. 222. — St. 1862, c. 66. — St. 1862, c. 151. — St. 1862, c. 166. — St. 1863, c. 79. — St. 1863, c. 176. — St. 1864, c. 47. — St. 1864, c. 143, s. 1, 2. All of which were repealed by St. 1865, c. 232, s. 6.) St. 1865, c. 232. — St. 1865, c. 251. — St. 1866, c. 172. — St. 1866, c. 282. — St. 1867, c. 136. — St. 1868, c. 107. — St. 1868, c. 110.

Raising of money for monuments to soldiers, authorized. St. 1864, c. 100.

Raising of money for recruiting purposes, authorized. St. 1864, c. 103. — St. 1864, c. 120. — St. 1865, c. 108.

Raising or expending of money for the purpose of offering or paying bounties to volunteers, forbidden, except, &c. St. 1863, c. 91, s. 1. See *Stetson v. Kempton*, 13 Mass. 272.

Act to legalize previous doings of towns in paying or agreeing to pay bounties or recruiting expenses. St. 1863, c. 38.

(Raising of money for defence against attacks from the sea, authorized. St. 1861, c. 222, s. 4. Repealed by St. 1865, c. 232, s. 6.)

(Raising of money to refund contributions of individuals

given for recruiting purposes, authorized. St. 1865, c. 152. Repealed by St. 1866, c. 70.)

(Raising of money to add to the regular pay of soldiers or for drilling, forbidden. St. 1861, c. 222, s. 3. Repealed by St. 1865, c. 232, s. 6.)

(Voting or appropriation of money to relieve or discharge persons called or drafted into the military service of the United States, under U. S. St. of March 3d, 1863, forbidden. St. 1863, c. 122. Obsolete.)

SECT. 11. "*Such necessary orders and by-laws.*" A by-law of the city of Boston, requiring every person, who enters his particular drain into a common sewer of the city, to pay to the city such sum as is his just proportion of the expense of making such common sewer, having reference always to the last valuation of such person's estate in the assessor's books, previous to such expenditure, was held to be void, for inequality and unreasonableness. *Boston v. Shaw*, 1 Met. 130.

As to by-laws regulating omnibuses and stage-coaches, &c., see *Commonwealth v. Stodder*, 2 Cush. 562; see also Gen. St. c. 19, s. 14.

Under the act of 1847, c. 166, authorizing towns "to make all by-laws that may be necessary to preserve the peace, good order, and internal police," it was held that a town was not authorized in making a by-law prohibiting the sale therein, by any person not duly licensed according to law, of "any strong beer, ale, or other intoxicating liquor, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time." *Commonwealth v. Turner*, 1 Cush. 493.

For a case upon the validity of an order regulating the driving of swine, see *Commonwealth v. Curtis*, 9 Allen, 226.

As to what by-laws a town may legally make, see *Commonwealth v. Patch*, 97 Mass. 221, 223.

Towns may make by-laws to prevent the falling, and to provide for the removal of snow and ice from the roofs of buildings. St. 1863, c. 86.



Also for the removal of ice and snow from sidewalks. St. 1863, c. 114.

Also to prevent fast driving. St. 1865, c. 31. See *Commonwealth v. Worcester*, 3 Pick. 462.

SECT. 14. The supreme court has no jurisdiction to revise the proceedings of the superior court in approving by-laws. *Inhabitants of Weymouth, Petitioners*, 2 Cush. 335.

SECT. 15. As to how far such by-laws might by the common law be made binding on persons not inhabitants of the town, see *Commonwealth v. Stodder*, 2 Cush. 576. — *Vandine, Petitioner*, 6 Pick. 187.

*Additional Duties of Towns.*

As to providing lock-ups. St. 1862, c. 216, s. 16, 17.

To return copies of their annual reports and of certain special reports to the state librarian. St. 1866, c. 195.

*Meetings.*

SECT. 19. The reference in this section to the twenty-third article of the amendments to the constitution might be omitted, as that article was annulled by the twenty-sixth article of amendment adopted in 1868.

In the case of persons who had the requisite qualifications as to age and residence, but who had been for two years exempted from taxation by the town assessors, either by being omitted to be assessed, or by abatement of the tax as being unable by reason of age, infirmity, or poverty to contribute toward the public charges, it was held that they were neither "paupers" nor persons "by law exempted from taxation" within the meaning of the third article of the amendments to the constitution, the language of which is similar to that of this section, and that they were not, under that article, entitled to vote for the officers therein named. *Opinion of Justices*, 11 Pick. 537. — *Opinion of Justices*, 5 Met. 591.

"*Resided.*" See notes on Gen. St. c. 11, s. 6.

"*And who has paid by himself.*" Though a tax which is

assessed upon one person, is paid for him by another without his previous authority, still if he recognizes the act, and repays or promises to repay the amount on the ground that such person acted as his agent, he thereby acquires the same right to vote as if he had paid the tax with his own hand. *Humphrey v. Kingman*, 5 Met. 162.

*"Assessed upon him."* It makes no difference whether the tax was legally or illegally assessed, if the person was otherwise duly qualified. *Humphrey v. Kingman*, 5 Met. 162.

SECT. 21. *"In pursuance of a warrant."* Seals are not essential to the validity of such warrants. *Colman v. Anderson*, 10 Mass. 105.

*"Under the hands of the selectmen."* A town meeting cannot be legally held unless the warrant is signed by a majority, at least, of the selectmen. *Reynolds v. New Salem*, 6 Met. 340. See also Gen. St. c. 3, s. 7, third clause.

*"Who shall forthwith notify," &c.* It is not necessary that the persons to whom the warrant is directed should specify in their returns all their acts in the premises. It is sufficient if the return states that the inhabitants were notified "as the law directs" or "pursuant to the warrant." *Briggs v. Murdock*, 13 Pick. 305.

*"In the manner prescribed by the by-laws or a vote of the town."* As to the notice to be given in the absence of any by-law or vote upon the subject, see *Rand v. Wilder*, 11 Cush. 294, 296.

SECT. 22. *"Unless the subject-matter thereof is contained in the warrant."* "A warrant issued by town officers for a town meeting is not to be construed with the same strictness as a power of attorney or a penal statute. If it gives intelligible notice of the subjects to be acted upon, it is sufficient." *Grover v. Pembroke*, 11 Allen 88, 89. See also, on the question of what constitutes an insertion of a subject in the notice, sufficient to authorize action upon it at the meeting, *Fuller v. Groton*, 11 Gray 340. — *Rand v. Wilder*, 11 Cush. 294, 298. — Wood

*v. Quincy*, 11 Cush. 487. — *Hadsell v. Hancock*, 3 Gray 526. — *Avery v. Stewart*, 1 Cush. 496.

For a case in which it was held that, until otherwise shown, it was to be presumed that the notification of an annual town meeting was regular and legal, see *Gilmore v. Holt*, 4 Pick. 258, 261.

When an application for calling a meeting of a school district set forth the objects of the meeting, and such application was annexed to the warrant, and the persons to whom the warrant was addressed, were directed to warn the inhabitants of the district to meet for the purpose of acting on the articles named in such annexed application, it was held that such articles were as effectually a part of the warrant as if they were embodied in it. *George v. Mendon*, 6 Met. 497.

#### *Moderators.*

SECT. 29. An indictment may be brought under the common law for disorderly behavior at town meetings. *Commonwealth v. Hoxey*, 16 Mass. 385.

#### *Election and Appointment of Town Officers.*

SECT. 31. "*Until others are chosen and qualified in their stead.*" See *Dow v. Bullock*, 13 Gray 136.

"*Three or more assessors.*" When a town chose three assessors, and two of them were sworn, but the third, without refusing to accept the trust, omitted to take the oath of office, and when called upon to act, declined to do so, it was held that if the town did not choose another assessor, the taxes might be assessed by the two. *George v. Mendon*, 6 Met. 497.

SECT. 32. By St. 1862, c. 93, s. 3, fence-viewers were required to be chosen by ballot. By St. 1864, c. 248, this provision was repealed, and elections of fence-viewers previously had without ballot were confirmed.

"*The election of all other town officers.*" It is not necessary to the validity of an election that the records should show a determination by the meeting in regard to the mode of election. *Howard v. Proctor*, 7 Gray 128, 131.

SECT. 37. Selectmen may appoint weighers of boilers and heavy machinery. St. 1863, c. 173.

SECT. 38. An appointment of persons as police officers, "whose duties shall be to superintend the police of the town," is sufficient to give the persons so appointed the powers of constables as provided in this section. *Commonwealth v. Martin*, 98 Mass. 4.

An appointment of a police officer by the selectmen of a town, "to continue in said office till the next town meeting," is a valid appointment "during the pleasure of the selectmen" within the meaning of this section. *Commonwealth v. Higgins*, 4 Gray 34.

SECT. 42. Selectmen may also appoint a collector *pro tempore*, when the collector fails to give bond. St. 1865, c. 234.

"*Until another is chosen.*" It is not necessary that this limitation should be expressed in the appointment. *Blackstone v. Taft*, 4 Gray 250, 253.

SECT. 43. Vacancies in the office of highway surveyor, fence-viewer, constable, or field-driver, may be filled by selectmen. St. 1864, c. 174.

*Clerk.*

SECT. 45. "The clerk of a town is not required by law to record the reports of committees. His duty is discharged by recording the votes passed by the town." See *Howard v. Stevens*, 3 Allen 409, 410.

He should make a record of his own election and qualification. *Briggs v. Murdock*, 13 Pick. 305.

*Selectmen.*

SECT. 49, 50. Selectmen have no power, by virtue of their office and without any special authority from the town, to issue to persons having claims on the town negotiable notes, bills of exchange, or orders, on which the town can be held liable to any persons other than those to whom they were originally issued. *Smith v. Cheshire*, 13 Gray 318.

It seems that selectmen are not authorized to institute and

prosecute suits in the name of their town, or to defend suits against it, without further authority than that which attaches to their office as selectmen. *Walpole v. Gray*, 11 Allen 149, 150.

*Assessors of Taxes.*

SECT. 51-53. Assessors to return annually to state treasurer the names, &c., of certain corporations established in their several cities and towns. (St. 1864, c. 208, s. 1, 13) — St. 1865, c. 283, s. 1, 14.

To return certain "tables of aggregates," &c., to the secretary of the commonwealth. St. 1861, c. 167, s. 3-5. — St. 1864, c. 210.

To make returns every three years to the secretary of the commonwealth respecting certain corporations established in their respective cities and towns. St. 1861, c. 171.

(To send certain copies of returns received under Gen. St. c. 68, to assessors of other towns. St. 1862, c. 86. Repealed by St. 1864, c. 201.)

*Treasurer.*

SECT. 54. "*Shall give bond.*" Such bond should be given to the town and not to the selectmen. *Stevens v. Hay*, 6 Cush. 229.

"*And pay over and account for the same,*" &c. The treasurer will be liable if he does not pay over money collected by him, although it has been stolen from him without his fault. *Hancock v. Hazzard*, 12 Cush. 112.

SECT. 57. "*He may appoint deputies.*" Such deputies may execute a warrant for the collection of taxes, though they were appointed before the warrant was issued, and though the warrant was directed to the collector only. *Aldrich v. Aldrich*, 8 Met. 102.

*Constables.*

SECT. 61. As to the proper form of a constable's bond, see *Tracy v. Goodwin*, 5 Allen 409.

Constables in Boston shall not serve any civil process unless they give bond to city treasurer in sum of \$3,000, and

having given such bond may serve any writ or process in any personal action or process in replevin returnable in the *municipal court* of the city of Boston, or any writ or other process in any personal action, wherever returnable, in which damages are not laid at more than \$300, and any process in replevin in which the subject-matter does not exceed that amount in value. St. 1860, c. 147. — St. 1866, c. 279. — St. 1869, c. 247. Prior to this statute the bonds of constables in Boston were required to be given to the city treasurer. *Tracy v. Goodwin*, 5 Allen 409.

The failure of a constable to give bond can only be availed of in a suit to which he is a party. *Elliott v. Willis*, 1 Allen 461, 462.

As to whether the facts necessary to show the constable's authority should appear on the face of the writ served by him, see *Pomeroy v. Trimper*, 8 Allen 398, 402.

Constables of Boston may serve certain criminal processes in Hull. St. 1864, c. 50.

A person who, by false representations that he is qualified to serve civil process, induces another to commit a writ to him for service, is not liable to an action for neglecting to serve it. *Whitney v. Blanchard*, 2 Gray 208.

SECT. 62. "*Any person injured by a breach of the condition of such bond.*" There is such a breach, if the constable takes the goods of A. on a writ against B. *Greenfield v. Wilson*, 13 Gray 384. — *Tracy v. Goodwin*, 5 Allen 409, 411.

But a failure of a constable to pay to the plaintiff in an action money intrusted to him in settlement of the suit by the defendant after service of the writ will not constitute such breach. *Boston v. Moore*, 3 Allen 126.

"*May at his own expense institute a suit thereon.*" In the case of Boston constables, judgment must be recovered against the constable before an action is brought on the bond. *Calder v. Haynes*, 7 Allen 387.

"*The like proceedings shall be had,*" &c. As to the meaning of this, see *Greenfield v. Wilson*, 13 Gray 384.

*Additional Duties of Constables.*

They shall aid the state constable and his deputies. St. 1866, c. 261, s. 2.

Shall endeavor to suppress the manufacture and sale of intoxicating liquors. St. 1866, c. 261, s. 4.

*Collectors of Taxes.*

SECT. 71. "*Suitable persons.*" A selectman and assessor of a town may legally be chosen collector of taxes also. *Howard v. Proctor*, 7 Gray 128.

"*If the persons chosen refuse to serve.*" How this must appear. *Hays v. Drake*, 6 Gray 387.

In case of a refusal by the persons chosen, a constable duly chosen and sworn is qualified to act as collector of taxes without any further oath. *Hays v. Drake*, 6 Gray 387.

SECT. 72. As to the collector's liability on his bond, see *Wendell v. Fleming*, 8 Gray 613. — *Sandwich v. Fish*, 2 Gray 298. — *Colerain v. Bell*, 9 Met. 499.

*Surveyors of Highways.*

It seems that selectmen may be chosen and act as surveyors of highways. *Benjamin v. Wheeler*, 15 Gray 486, 490.

SECT. 75. A surveyor is not liable to a town for damages recovered of such town on account of any deficiency in its highways occasioned by his fault or neglect. *White v. Phillipston*, 10 Met. 180.

*Abuse of Corporate Powers.*

SECT. 79. See *Hood v. Lynn*, 1 Allen 103. — *Fuller v. Melrose*, 1 Allen 166. — *Frost v. Belmont*, 6 Allen 152. — *Allen v. Marion*, 11 Allen 108. — *Tash v. Adams*, 10 Cush. 252. *Babbitt v. Savoy*, 3 Cush. 530.

*Additional.*

Auditing officers may require claimants to make oath to certain facts. St. 1862, c. 101, s. 3.

Town officers are entitled to no compensation for the dis-

charge of their ordinary official duties, where no provision for any compensation is made by law and in the absence of any contract. *Sikes v. Hatfield*, 13 Gray 347, 351.

## CHAPTER XIX.

### OF CERTAIN POWERS AND DUTIES OF CITIES.

Act to provide for the appointment of *assistant city clerks*. St. 1869, c. 72.

SECT. 2, 3. Cities, by vote of their common council, may raise or appropriate money for the providing of armories for the use of military companies, for the celebration of holidays, and for other purposes of a public nature, provided, &c. St. 1861, c. 165.

The mayor and aldermen of cities may remove sealers of weights and measures. St. 1863, c. 179, s. 5.

They may appoint police officers with all or any of the powers of constables except the power of serving and executing civil processes. St. 1867, c. 279.

City councils may raise money for the purpose of procuring the detection and apprehension of persons committing felonies. St. 1869, c. 206.

SECT. 14. For a case showing the reason for and the effect of the provisions of this section, see *Commonwealth v. Stodder*, 2 Cush. 562.

SECT. 16. How and when a new division of cities into wards may be made. St. 1865, c. 7.

## CHAPTER XX.

### OF THE CENSUS.

This chapter repealed and superseded by St. 1865, c. 69.

See also, "An act to obtain the industrial statistics of the commonwealth." St. 1865, c. 146.



## CHAPTER XXI.

## OF THE REGISTRY AND RETURNS OF BIRTHS, MARRIAGES, AND DEATHS.

SECT. 2. (By St. 1865, c. 96, physicians and midwives were required to make monthly returns of births at which they were present. This statute was however repealed by St. 1866, c. 138, s. 2.)

SECT. 6. This provision "is but declaratory of the law in this commonwealth." GRAY, J., in *Kennedy v. Doyle*, 10 Allen 161, 164. This case contains a thorough examination of the law on this subject.

SECT. 7. The fees provided for in this section are altered by St. 1866, c. 138, s. 1.

SECT. 11. As to the fees of the registrar, see St. 1866, c. 138, s. 1.

## CHAPTER XXII.

## OF WORKHOUSES AND ALMSHOUSES.

Keepers of workhouses to make certain returns. St. 1864, c. 307, s. 1.

## CHAPTER XXIII.

## OF WATCH AND WARD.

SECT. 3. "Police officers, and officers and members of the watch in any city or town, when on duty, may carry such weapons as the mayor and aldermen of such city or the selectmen of such town shall authorize." St. 1864, c. 110.

## CHAPTER XXIV.

## OF FIRES AND FIRE DEPARTMENTS.

*Extinguishment of Fires.*

SECT. 4. "*The fire-wards or any three of them,*" &c. One fire-ward acting alone has no more authority than any other person to direct the destruction of a house, although it may be impossible for the other fire-wards or other officers mentioned in this section to get to the place where the occasion for action upon the subject arises. *Parsons v. Pettingell*, 4 Allen 507. See also *Coffin v. Nantucket*, 5 Cush. 269.

*Fire Districts.*

Fire districts may raise money for street lamps. St. 1864, c. 159.

("An act to provide for the dissolution or dismemberment of fire districts in certain cases." St. 1868, c. 336. Repealed by St. 1869, c. 417.)

SECT. 36. In case of vacancy or disability of clerk the selectmen may appoint a clerk *pro tem*. St. 1865, c. 257.

*Special Provisions.*

Act concerning the appointment of men for hose-carriages. St. 1869, c. 92.

## CHAPTER XXV.

## OF FENCES AND FENCE-VIEWERS, POUNDS AND FIELD-DRIVERS.

*Fences.*

SECT. 10. Fence-viewers, when called to act under this section, may determine whether a fence is required, and may, when the division line is in dispute or unknown, fix a line for a fence, &c., &c. St. 1863, c. 190.

SECT. 17. Fees of fence-viewers to be paid by such parties as they may determine, &c. St. 1862, c. 93.

*Pounds and Impounding of Cattle; Field Drivers.*

SECT. 21. "*Going at large \* \* \* and not under the care of a keeper.*" As to the meaning of these expressions, see *Bruce v. White*, 4 Gray 345. — *Parker v. Jones*, 1 Allen 270.

"*Public highways.*" These include turnpikes. *Pickard v. Howe*, 12 Met. 198.

"*In an action of tort.*" As to the proper form of declaration in such action, see *Crippen v. Byron*, 4 Gray 314.

SECT. 22. "*Forthwith impound.*" That is, without unnecessary delay. See *Byron v. Crippen*, 4 Gray 312.

"*In the city or town pound.*" See *Anthony v. Anthony*, 6 Allen 408.

In towns passing vote to that effect a field-driver may impound beasts *on his own premises*. St. 1869, c. 366.

SECT. 23. Fees for swine altered from four to ten cents per head. St. 1863, c. 178.

SECT. 25. "*Proceeding therewith as hereinafter directed.*" If the party distraining omits so to proceed, he will be liable as a trespasser ab initio. *Merrick v. Work*, 10 Allen 544.

SECT. 28. The pound-keeper is justified in keeping, until the fees, &c., are paid, beasts taken up by a field-driver for going at large and put into the pound, even though they were not actually, when taken, going at large contrary to law. *Folger v. Hinckley*, 5 Cush. 263.

SECT. 29. As to the proper form of notice under this section, see *Sanderson v. Lawrence*, 2 Gray 178. — *Cleverly v. Towle*, 3 Allen 39.

Actual knowledge by the owner of the beasts of the impounding will not render the notice unnecessary. *Coffin v. Field*, 7 Cush. 355.

SECT. 30. As to the form of the notice under this section, see cases cited under the preceding section.

SECT. 38. See *Field v. Colman*, 5 Cush. 267.

## TITLE VIII.

## OF THE PUBLIC HEALTH AND BURIALS.

## CHAPTER XXVI.

## OF THE PRESERVATION OF THE PUBLIC HEALTH.

"An act to establish a State Board of Health." St. 1869, c. 420.

SECT. 1-4. Boards of health may appoint agents, &c. St. 1866, c. 271.

*Nuisances, Contagion, &c.*

Provisions relative to nuisances caused by lands that are "wet, rotten, or spongy, or covered by stagnant water, so as to be offensive to persons residing in the vicinity thereof or injurious to health." St. 1868, c. 160.

SECT. 7-9. Party aggrieved by neglect or refusal of board of health to pass proper order abating nuisance may appeal to the county commissioners. St. 1866, c. 211.

SECT. 8. An order under this section is valid without previous notice to parties interested and opportunity for them to appear and be heard. *Salem v. Eastern R.R.*, 98 Mass. 431, 442.

As to the proper form of an order under this section, see *Salem v. Eastern R.R.*, 98 Mass. 431, 444.

SECT. 10. "*The board may cause the nuisance, &c., to be removed.*" As to the powers of the board under this provision, see *Salem v. Eastern R.R.*, 98 Mass. 431, 445.

"*All expenses incurred thereby shall be paid by the owner,*" &c. An action to recover the money paid for such expenses is properly to be brought in the name of the city or town, and not in that of the board of health. *Salem v. Eastern R.R.*, 98 Mass. 431, 442.

The defendant in such action, if he had no opportunity to be

heard before the board of health, is not concluded by its findings and adjudications as to the existence and alleged cause of the nuisance and his duty to remove it. *Salem v. Eastern R.R.*, 98 Mass. 431, 446.

*Hospitals and Dangerous Diseases.*

SECT. 50. See *Commonwealth v. Fahey*, 5 Cush. 408.

*Offensive Trades.*

SECT. 52. See *Belcher v. Farrar*, 8 Allen 325. — *Winthrop v. Farrar*, 11 Allen 398.

SECT. 55. See *Winthrop v. Farrar*, 11 Allen 398.

SECT. 56. Appeal may be made after three days in certain cases. St. 1865, c. 263.

## CHAPTER XXVII.

### OF THE PROMOTION OF ANATOMICAL SCIENCE.

## CHAPTER XXVIII.

### OF CEMETERIES AND BURIALS.

SECT. 2. *Voting by proxy* in cemetery corporations to be according to Gen. St. c. 60, s. 7. St. 1866, c. 104.

SECT. 3. Sale, &c., of lots in cemeteries by executors, administrators, guardians, or trustees may be authorized by probate courts. St. 1869, c. 35.

SECT. 6. "*Interments.*" This word includes the removal of bodies of deceased persons for the purpose of burial. *Commonwealth v. Goodrich*, 13 Allen 546.

As to the nature of the regulations which may be made under this section, see *Commonwealth v. Goodrich*, 13 Allen 546. — *Withington v. Harvard*, 8 Cush. 66, 68.

SECT. 12. For cases arising under this section, see *Commonwealth v. Viall*, 2 Allen 512. — *Commonwealth v. Wellington*, 7 Allen 299.

*Additional Provisions.*

Effect of recording deeds of lots in cemeteries in the books of the corporation. St. 1865, c. 252.

Provisions for the enlargement of town burial-grounds when adjoining land owner refuses to sell. St. 1866, c. 112.

---

**TITLE IX.**

---

**CHAPTER XXIX.****OF THE PUBLIC RECORDS.**

COPIES of records of town proprietaries may be made and deposited in the registry of deeds, &c. St. 1867, c. 265.

---

**TITLE X.**

OF PARISHES AND RELIGIOUS SOCIETIES; AND OF RELIGIOUS, CHARITABLE, AND EDUCATIONAL FUNDS AND ASSOCIATIONS.

---

**CHAPTER XXX.****OF PARISHES AND RELIGIOUS SOCIETIES.**

UPON the question whether a body is to be considered as a "religious society" or as a corporation of proprietors, see *Cogswell v. Bullock*, 13 Allen 90.

SECT. 1. "*With the powers given to corporations by chapter sixty-eight.*" These powers do not include the right to apply for a dissolution of the corporation under Gen. St. c. 68, s. 35-39. *In re New South Meeting-House in Boston*, 13 Allen 497, 516.

SECT. 3. See *Parker v. May*, 5 Cush. 336, 349.

SECT. 4. "*Or which may be unable to assemble in the usual manner.*" See Reformed Methodist Soc. of Douglas v. Draper, 97 Mass. 349, 353. — Wood v. Cushing, 6 Met. 448, 456.

SECT. 6. *Membership.* "Any parish or religious society may admit to membership *women*, who shall have all the rights and privileges of men." St. 1869, c. 346, s. 1.

"Any territorial parish may admit to membership persons not residents of its territory." St. 1869, c. 346, s. 2.

SECT. 12. See Reformed Methodist Soc. of Douglas v. Draper, 97 Mass. 349, 353.

SECT. 15. Clerk may administer oath to treasurer also. St. 1865, c. 100.

SECT. 21. "*Their personal estate.*" Includes for this purpose shares in corporations notwithstanding St. 1864, c. 208, and St. 1865, c. 283. St. 1866, c. 196.

SECT. 24. See Hamblett v. Bennett, 6 Allen 140.

SECT. 25. This section amended by St. 1869, c. 248.

SECT. 33. "*The treasurer shall sell,*" &c. An action for the price of a pew so sold must be brought in the name of the treasurer and not in that of the parish. First Parish in West Newbury v. Dow, 3 Allen 369.

SECT. 35. It seems that a church can be sold only for one of the purposes here specified. *In re* New South Meeting-House in Boston, 13 Allen 497, 511.

SECT. 37. "*Unfit for the purposes of public worship.*" See Gorton v. Hadsell, 9 Cush. 508.

SECT. 40. See First Parish in Newbury v. Dow, 3 Allen 369.

## CHAPTER XXXI.

### OF DONATIONS AND CONVEYANCES FOR PIOUS AND CHARITABLE USES.

SECT. 1. "*Other similar offices.*" See Weld v. May, 9 Cush. 181.

See also, in relation to this section, Parker v. May, 5 Cush. 336, 346. — Bartlet v. King, 12 Mass. 537.

SECT. 8. See *Dexter v. Gardner*, 7 Allen 243, 245.

SECT. 9. (By St. 1864, c. 239, s. 2, 3, and St. 1865, c. 271, trustees for religious, charitable, or educational purposes were required to make certain annual returns to the secretary of the commonwealth. But these statutes were repealed by St. 1866, c. 75.)

## CHAPTER XXXII.

### OF ASSOCIATIONS FOR RELIGIOUS, CHARITABLE, AND EDUCATIONAL PURPOSES.

Private charitable institutions, when aided by grants from the state, required to make certain returns annually to the board of state charities. St. 1867, c. 243.

SECT. 1. The words "literary, benevolent, scientific," inserted in this section after the word "educational." St. 1869, c. 276.

SECT. 5. The words "literary, benevolent, scientific," inserted in this section after the word "educational." St. 1869, c. 276.

## CHAPTER XXXIII.

### OF PUBLIC LIBRARIES.

#### *Law Libraries.*

SECT. 6. Alteration of amount to be paid by county treasurers to county law library associations. St. 1863, c. 215.

#### *Town and City Libraries.*

SECT. 9. Repealed and superseded by St. 1866, c. 222.



## TITLE XI.

## OF PUBLIC INSTRUCTION AND REGULATIONS RESPECTING CHILDREN.

Act relating to the election of members of the board of overseers of Harvard College. St. 1865, c. 173.

Act to establish a state primary school. St. 1866, c. 209.

Acts concerning the education of deaf mutes. St. 1867, c. 311. — St. 1868, c. 200.

## CHAPTER XXXIV.

## OF THE BOARD OF EDUCATION.

Certain returns of educational statistics to be made to the board of education. St. 1867, c. 123.

SECT. 8. Salary and allowances of secretary altered by St. 1862, c. 212. — St. 1864, c. 99. — St. 1865, c. 246. — St. 1866, c. 150. — St. 1867, c. 276.

SECT. 9. Salaries, &c., of agents of board of education. St. 1862, c. 212. — St. 1864, c. 99. — St. 1866, c. 150.

## CHAPTER XXXV.

## OF TEACHERS' INSTITUTES AND ASSOCIATIONS.

SECT. 4, 5. These sections repealed and superseded by St. 1864, c. 58.

## CHAPTER XXXVI.

## OF THE SCHOOL FUNDS.

Act providing for commissioners to manage the Massachusetts school fund. St. 1866, c. 53.

SECT. 3. This section amended by St. 1865, c. 142, s. 1, 4. — St. 1866, c. 208. — St. 1867, c. 98. — St. 1869, c. 168.

SECT. 6, 7. See St. 1862, c. 83, s. 1.

As to the income of the "Rogers book fund," see St. 1862, c. 83, s. 1.

## CHAPTER XXXVII.

### OF STATE SCHOLARSHIPS.

This chapter, having been amended by St. 1864, c. 218, was repealed and superseded by St. 1866, c. 210.

## CHAPTER XXXVIII.

### OF THE PUBLIC SCHOOLS.

Two or more towns may unite in establishing *union schools* for the accommodation of contiguous portions of each. St. 1868, c. 278.

SECT. 1. *Agriculture* added to the list of optional branches. St. 1862, c. 7.

SECT. 2. The number of families or householders in a town to be determined by the latest state or U. S. census. St. 1868, c. 226.

SECT. 7. This section amended by substituting the word "twelve" for the word "fifteen" in the third line. St. 1869, c. 305.

SECT. 12. Towns may raise and appropriate money for the conveyance of pupils to and from the public schools. St. 1869, c. 132.

SECT. 16. "*Shall have the general charge and superintendence,*" &c. This includes the power of fixing times of vacations and of granting holidays. Ninth School District in Weymouth *v.* Loud, 12 Gray 61. As to the powers of the school committee under this clause, see further, Huse *v.* Lowell, 10 Allen 149, 150.—Spiller *v.* Woburn, 12 Allen 127, 128.

SECT. 20. Term of office of school committee in cities to

commence at the same time as that of city council. St. 1865, c. 134.

SECT. 23. "*Select and contract with.*" This includes the power to fix the compensation to be paid to the teachers, and to bind the town to pay the same. *Charlestown v. Gardner*, 98 Mass. 587, 590. — *Batchelder v. Salem*, 4 Cush. 599.

"*Shall require full and satisfactory evidence,*" &c. It seems that these duties cannot be delegated to the prudential committee. See School District No. 10 in *Uxbridge v. Mowry*, 9 Allen 94.

"*Qualifications for teaching.*" See School District in *Uxbridge v. Mowry*, 9 Allen 94, 96.

SECT. 25. As to payment of salary in case of dismissal under this section, see *Knowles v. Boston*, 12 Gray 339.

SECT. 27. This section repealed and superseded by St. 1862, c. 57.

SECT. 28. How a change of school books may be made when school committee consists of more than eighteen persons. St. 1863, c. 126. How when of less than twelve persons. St. 1867, c. 155.

SECT. 35. Compensation of superintendents of public schools to be not less than \$1.50 for each day of actual service. St. 1860, c. 101.

#### *School-Houses.*

SECT. 38. "*In the manner provided for laying out highways.*" The word "*highways*" struck out and "*town-ways*" substituted. St. 1869, c. 26.

"*Tender of payment \* \* \* to the owner.*" When the owner lives out of the commonwealth, such tender may be made to a person left by him in possession of the premises and who for some purposes is his agent. *Gibbons v. S. W. School District in E. Granville*, 4 Allen 508.

For another case under this section, see *Harris v. Marblehead*, 10 Gray 40.

## CHAPTER XXXIX.

## OF SCHOOL DISTRICTS.

The whole school district system, as established by this chapter and subsequent amendatory acts, was abolished by St. 1869, c. 110, and St. 1869, c. 423.

## CHAPTER XL.

## OF SCHOOL REGISTERS AND RETURNS.

SECT. 4. For new form of certificate, see St. 1865, c. 135, s. 2, 3.

SECT. 13. The school committee have no right to waive the keeping, &c., of the register by a teacher. *Jewell v. Abington*, 2 Allen 592.

## CHAPTER XLI.

## OF THE ATTENDANCE OF CHILDREN IN THE SCHOOLS.

SECT. 9. "*On account of \* \* \* religious opinions.*" See *Spiller v. Woburn*, 12 Allen 127, 129.

## CHAPTER XLII.

## OF THE EMPLOYMENT OF CHILDREN AND REGULATIONS RESPECTING THEM.

SECT. 1. New provisions upon the subject of this section. (St. 1866, c. 273, repealed by St. 1867, c. 285, s. 5.) St. 1867, c. 285.

SECT. 4. The word "many" in the first line of this section altered to "shall" by St. 1862, c. 21, s. 1. New provision afterwards made concerning truant children and absentees from school by St. 1862, c. 207, which amended by St. 1863,

c. 44. — St. 1863, c. 128. — St. 1865, c. 208, s. 3. — (St. 1866, c. 283, s. 5. Repealed by St. 1867, c. 156.)

See also "An act concerning the care and education of neglected children." St. 1866, c. 283, amended by St. 1867, c. 2.

SECT. 5. The words "availing themselves of the provisions of the preceding section" struck out by St. 1862, c. 21, s. 2.

Officers appointed under this section do not hold over until a successor is appointed. *Huse v. Lowell*, 10 Allen 149, 151.

---

## TITLE XII.

### OF WAYS, BRIDGES, PUBLIC PLACES, FERRIES, SEWERS, AND DRAINS.

---

#### CHAPTER XLIII.

#### OF THE LAYING-OUT AND DISCONTINUANCE OF HIGHWAYS, TOWN- WAYS, AND PRIVATE-WAYS.

##### *General Matters relating to the subject of this Chapter.*

Betterment law for laying out, altering, widening, and improving streets in cities and towns. St. 1866, c. 174. — St. 1868, c. 75. — St. 1868, c. 276. — St. 1869, c. 169. — St. 1869, c. 367.

"An act to authorize cities and towns to take earth and gravel for the construction and repair of ways." St. 1869, c. 237.

Laying out or alteration of any highway, town-way, or private way to be void as against the owner of any land over which the same is located, unless possession is taken of such lands for the purpose of constructing such way within two years from the time when the right to take such possession

first accrued. St. 1869, c. 303. (For prior laws on the same subject, see St. 1862, c. 203. St. 1863, c. 108.)

Lands of state lunatic hospitals not to be taken for ways without special leave of legislature. St. 1862, c. 223, s. 2.

“Many of the provisions of the statute relative to the laying out of highways are directory and not conditional, and a failure to comply with them does not render the proceedings void.” Per Shaw C. J. in *Commonwealth v. B. & Lowell R. R. Co.*, 12 Cush. 254, 255.

As to whether “altering” a way discontinues the original way, see *Johnson v. Wyman*, 9 Gray 186, 189.

If reasonable care and skill be not used in the making, &c., of a way, bridge, &c., and damage thereby ensues, the remedy is not according to the provisions of this chapter, but by an action of tort. *Perry v. Worcester*, 6 Gray 544, 547. — *Sprague v. Worcester*, 13 Gray 193, 195.

#### *Highways.*

SECT. 1. As to the certainty of the description of the proposed highway required in a petition for laying out, see *Westport v. County Commissioners of Bristol*, 9 Allen 203.

SECT. 5. “*As soon as may be after the hearing.*” *Westport v. County Commissioners of Bristol*, 9 Allen 203.

SECT. 12. “*The expense shall be assessed.*” “Expense” includes damages to land owners. *Damon v. Reading*, 2 Gray 274.

SECT. 13. “*The manner in which,*” &c. See *Commonwealth v. Boston & Lowell Railroad Co.*, 12 Cush. 254, 258.

SECT. 16. As to what are to be considered *damages* for which compensation can be recovered under this section, see *Commonwealth v. Sessions of Norfolk*, 5 Mass. 435, 437. — *Ashby v. Eastern Railroad Co.*, 5 Met. 368, 372. — *Tufts v. Charlestown*, 4 Gray 537. — *Dickenson v. Fitchburg*, 13 Gray 546, 558. — *Old Col. & F. R. R.R. Co. v. Plymouth*, 14 Gray 155. — *First Church in Boston v. Boston*, 14 Gray 214.

As to the *benefits* that may be set off, see *Meacham v. Fitch-*

burg R.R. Co., 4 Cush. 291. — *Farwell v. Cambridge*, 11 Gray 413. — *Plympton v. Woburn*, 11 Gray 415. — *Dickenson v. Fitchburg*, 13 Gray 546, 558. — *Old Col. & Fall R. R.R. Co. v. Plymouth*, 14 Gray 155. — *Whitman v. Boston & Maine R.R. Co.*, 3 Allen 133 — s. c. 7 Allen 313. — *Whitney v. Boston*, 98 Mass. 312, 316.

The discontinuance of a highway gives no right to damages, under this section, to one whose land does not abut on the way discontinued and is accessible by other ways. *Castle v. County of Berkshire*, 11 Gray 26. See also note to chapter 63, section 21.

SECT. 19. "*A party aggrieved.*" A town in which a highway is laid out is such a party. *Westport v. County Commissioners*, 9 Allen 204, 205. See also, as to the meaning of these words, *Marshall Fishing Co. v. Hadley Falls Co.*, 5 Cush. 602, 604.

"*In laying out.*" This includes locating anew. *Hadley v. County Commissioners of Middlesex*, 11 Cush. 294.

See also notes to section 73 of this chapter.

SECT. 20. "*Alterations between the termini.*" This phrase "imports a change in the course or direction of the road, and not in the mode of its construction, or in the plan and manner in which it is to be built and finished." *Boston and Maine R.R. v. County of Middlesex*, 1 Allen 824, 829. A slight alteration of the position of one of the termini has been held not to be beyond the power of the jury under this section. *Hayward v. North Bridgewater*, 5 Gray 65.

SECT. 23. "*And the costs shall be taxed,*" &c. As to the manner of taxing costs in such cases, see *Wilmarth v. Knight*, 14 Gray 112.

SECT. 33. As to the duties of the presiding officer, see *Tripp v. County Commissioners of Bristol*, 2 Allen 556, 558.

SECT. 40. "*May set it aside for good cause.*" As to what is "good cause," see *Fitchburg Railroad Co. v. Eastern Railroad Co.*, 6 Allen 98.

SECT. 51. When county commissioners require the making

of a culvert, cattle pass, &c., they may require town to construct such culvert, &c., and may reimburse portion of the cost out of the county treasury. St. 1867, c. 256.

SECT. 53. "*Parties having several estates,*" *§c.* Tenants in common are such parties. *Dwight v. County Commissioners of Hampden*, 7 Cush. 533, 534. So also the owner of the fee of an estate and one who has a bond for a deed of the same. *Proprietors Locks and Canals v. Nashua & Lowell Railroad Co.*, 10 Cush. 385, 387.

*Town-ways and Private-ways.*

As to what are *town-ways*, see *Monterey v. County Commissioners of Berkshire*, 7 Cush. 394, 400.

SECT. 59. A town-way may be laid out, the only object of which is to give the public access to "pleasing natural scenery." *Higginson v. Nahant*, 11 Allen 530.

A private-way cannot be laid out "to be used only during time of sleighing." *Holcomb v. Moore*, 4 Allen 529.

SECT. 60. See *Avery v. Stewart*, 1 Cush. 496. — *Niles v. Patch*, 13 Gray 254, 259.

SECT. 62. "*To be assessed and awarded in the manner,*" *§c.* As to the manner of proceeding, see *Higginson v. Nahant*, 11 Allen 530, 537. The assessment of the damages should be made at the time of laying out. *Russell v. New Bedford*, 5 Gray 31, 34.

SECT. 63. It seems that this section does not apply to ways laid out by *city* officers. See *Shaw v. Charlestown*, 3 Allen 538, 539. But see section 81 of this chapter, also *Pickford v. Lynn*, 98 Mass. 491, 498.

SECT. 73. "*A person aggrieved,*" *§c.* A town aggrieved by the assessment by the county commissioners of damages sustained by the taking of land by them for a town-way may have a jury under this section. *West Newbury v. Chase*, 5 Gray 421.

As to what is sufficient evidence of title in the party petition-



ing for damages, see *Hawkins v. County Commissioners of Berkshire*, 2 Allen 254.

"*May be applied for at any time.*" Such application must be made when the board is in session. *Eaton v. Framingham*, 6 Cush. 245.

As to the *form* of a petition under this section, see *Perry v. Sherborn*, 11 Cush. 388.

"*Within one year,*" *§c.* See *Wood v. Quincy*, 11 Cush. 487. — *Russell v. New Bedford*, 5 Gray 31. — *Loring v. Boston*, 12 Gray 210.

See also notes to sections 19 and 79 of this chapter, and to section 20 of chapter 44.

*Ways in the County of Suffolk.*

The board of aldermen of the city of Boston, with the concurrence of the common council, may lay out highways and streets in the 13th, 14th, and 15th wards of that city, and pay for the land taken, but such highways and streets need not be completed until the board of aldermen deem it expedient. St. 1869, c. 448.

SECT. 79. "*Within one year,*" *§c.* As to the time when the year begins to run, compare sections 22, 63, 73, and 77 of this chapter. Report of Commissioners on Gen. St. of 1860, note to c. 43, s. 22. — St. 1847, c. 259, s. 4. — *Loring v. Boston*, 12 Gray 209. — *Shaw v. Charlestown*, 8 Allen 538.

See also notes to section 78 of this chapter, and to section 20 of chapter 44.

*Ways in Cities.*

SECT. 81. See *Shaw v. Charlestown*, 8 Allen 538, 539. See also note as to betterment law at head of this chapter.

*Dedication of Ways.*

SECT. 82. See *Taylor v. Boston Water Power Co.*, 12 Gray 415.

SECT. 84–86. These sections held to be unconstitutional in *Morse v. Stocker*, 1 Allen 150.

*Erection of Monuments.*

SECT. 88. The provisions of this section are merely *directory*, and the erection of bounds is not necessary to the validity of the laying out of a way. *Monterey v. County Commissioners of Berkshire*, 7 Cush. 394.

“*After being notified to do so.*” A notice to the *chairman* of the county commissioners is not sufficient to charge the county with the penalty. *Ilsey v. Essex County*, 7 Gray 465.

## CHAPTER XLIV.

## OF THE REPAIRS OF WAYS AND BRIDGES.

As to the meaning of the word “*repair*” in this chapter, see *Todd v. Rowley*, 8 Allen 51, 58.

As to how far the approaches to a *bridge* constitute a part of it, see *Commonwealth v. Deerfield*, 6 Allen 449.

*Public Ways and Bridges.*

SECT. 1. Towns are bound to make and keep in good condition passages for natural streams under highways. *Parker v. Lowell*, 11 Gray 353.

As to the right of towns to turn the surface drainage of ways upon the adjoining lands, see *Flagg v. Worcester*, 13 Gray 601. — *Franklin v. Fisk*, 13 Allen 211. — *Turner v. Dartmouth*, 13 Allen 291. — Also section 10 of this chapter.

Land which it is deemed necessary to enter upon, use, or take for the purpose of securing or protecting any public highway or bridge, may be so entered upon, &c. St. 1868, c. 269.

See also notes to section 22 of this chapter.

SECT. 7. See *Cheshire v. Howland*, 13 Gray 321.

SECT. 8. It seems that a surveyor may dig in or obstruct the side of the road outside of the travelled portion, but that a private individual, unless authorized by him, cannot do so. *Hollenbeck v. Rowley*, 8 Allen 478.

"*As to make the way safe and convenient.*" See *Kidder v. Dunstable*, 11 Gray 342.

SECT. 10. See cases cited under first section as to the right of a town to turn the surface drainage of a way upon adjoining lands.

SECT. 14. See *Todd v. Rowley*, 8 Allen 51.

SECT. 17. See *Eames v. Johnson*, 4 Allen 382.

SECT. 19. See *Benjamin v. Wheeler*, 8 Gray 409. — *Flagg v. Worcester*, 13 Gray 601. — *Erskine v. Boston*, 14 Gray 216.

If a surveyor of highways, contrary to the provisions of this section, turns a watercourse without the approbation of the selectmen, the only remedy of a person aggrieved will be that provided by section 19. *Benjamin v. Wheeler*, 15 Gray 486, 489. — *Elder v. Bemis*, 2 Met. 599, 604.

SECT. 20. "*Within one year,*" &c. As to when the year begins to run, see *Erskine v. Boston*, 14 Gray 216. — *Revere v. Boston*, 14 Gray 218. See also notes to chapter 43, sections 73 and 79.

SECT. 22. In order that a town should be liable under this section it is necessary that the defect or want of repair should be the *proximate* and not the *remote* cause of the injury. *Marble v. Worcester*, 4 Gray 395. — *Davis v. Dudley*, 4 Allen 557. — *Stevens v. Boxford*, 10 Allen 25. — *McDonald v. Snelling*, 14 Allen 290, 292.

Where a traveller, in the exercise of ordinary care and prudence, voluntarily leaped from his carriage because of its near approach to a dangerous defect, the town was held liable for an injury thereby sustained, although the carriage did not come in actual contact with the defect. *Lund v. Tyngsboro'*, 11 Cush. 568.

"When a horse, by reason of fright, disease, or viciousness, becomes actually uncontrollable, so that his driver cannot stop him or direct his course or exercise or regain control over his movements, and in this condition comes upon a defect in the highway, or upon a place which is defective for want of a railing, by which an injury is occasioned, the town is not liable for the injury unless it appears that it would have occurred if the

horse had not been so uncontrollable. But a horse is not to be considered uncontrollable that merely shies or starts, or is momentarily not controlled by the driver." *Titus v. Northbridge*, 97 Mass. 258, 265, 266. — *Horton v. Taunton*, 97 Mass. 266.

But where a horse, by throwing his tail over the rein, freed himself for a considerable time from any efficient control or guidance of his driver, and while so freed came upon a defect in the way, it was held that the town was not liable for injuries so occasioned, although at the moment of the accident the rein was disengaged from the horse's tail. *Fogg v. Nahant*, 98 Mass. 578.

A town will not be liable for an injury caused in part by a defect in the way and in part by the unlawful or careless act of a third person. *Rowell v. Lowell*, 7 Gray 100. — *Kidder v. Dunstable*, 7 Gray 104. — *Shepherd v. Chelsea*, 4 Allen 113. Nor for injuries due in part to causes occurring in part outside of the highway, although such causes are not connected with any thing unlawful or careless. *Richards v. Enfield*, 18 Gray 344, 346.

In order to recover, the party injured must have been himself in the use of such reasonable care as the circumstances required. *Stevens v. Boxford*, 10 Allen 25. — *Wilson v. Charlestown*, 8 Allen 137. — *Bigelow v. Rutland*, 4 Cush. 247. — *Horton v. Ipswich*, 12 Cush. 488. — *Gilman v. Deerfield*, 15 Gray 577. But the fact that he was intoxicated at the time will not necessarily prevent his recovering. *Alger v. Lowell*, 3 Allen 402, 406. Nor the fact that he was driving at the rate of ten miles an hour in the night-time. *Reed v. Deerfield*, 8 Allen 522. Nor the fact that he had previous knowledge of the defect. *Whittaker v. West Boylston*, 97 Mass. 278.

But if the party injured was at the time of the accident violating a public statute or town by-law or ordinance, as by driving at a forbidden rate of speed, he cannot recover. *Heland v. Lowell*, 3 Allen 407.

"The traveller must not only drive with due care and skill,

but must be using a proper horse and vehicle, with strong and suitable harness, and if there be a defect in any of these particulars, and such defect contributes to the disaster, the town is not liable, although the way be defective." *Murdock v. Warwick*, 4 Gray 178, 180. — *Bliss v. Wilbraham*, 8 Allen 564.

It is only those who are using ways *as travellers* that can recover for injuries caused by defects, — thus a town will not be responsible for damages happening to animals escaping into the highway without a driver. *Richards v. Enfield*, 13 Gray 344, 347. Nor for an injury to one who is using the highway simply for the purpose of play. *Blodgett v. Boston*, 8 Allen 237. But one who is walking in the highway simply for exercise is properly to be deemed a traveller. *Hamilton v. Boston*, 14 Allen 475, 483.

It is no defence to an action against a town to show that the town used ordinary care and diligence in repairing the road, if it remained in fact defective and the defect caused the injury. *Horton v. Ipswich*, 12 Cush. 488.

"*Bodily injury.*" As to the extent to which damages can be recovered for fright or mental suffering, see *Canning v. Williamstown*, 1 Cush. 451.

"*Damage in his property.*" This does not include all kinds of consequential damage, — thus a husband whose wife is injured cannot recover for medical and other expenses incurred, or for loss of her services in consequence of the injury. *Harwood v. Lowell*, 4 Cush. 310. Nor can one recover for trouble, expense, and loss of time in extricating his horses and sleigh from the snow. *Brailey v. Southborough*, 6 Cush. 141. Nor for damage caused to one by his being prevented by an obstruction from travelling on the way. *Holman v. Townsend*, 13 Met. 297. — *Smith v. Dedham*, 8 Cush. 522.

"*Defect or want of repair.*" A town will not be liable for such defect in a bridge whereby a highway passes over a railroad, the proprietors of which are bound by law to keep the bridge in repair. *Sawyer v. Northfield*, 7 Cush. 490. As to

the liability of towns for want of repairs at railroad crossings and for accidents occurring at such crossings, see *Davis v. Leominster*, 1 Allen 182. — *Gillett v. Western R.R. Co.*, 8 Allen 560.

A town will not be liable for an injury caused by a locomotive engine run by a railroad company on a track illegally laid across the highway. *Vinal v. Dorchester*, 7 Gray 421.

Nor for a defect so situated as not to interfere with travel except when it is turning off to a private road. *Smith v. Wendell*, 7 Cush. 498. See also *Smith v. Dedham*, 8 Cush. 522.

But a town will be liable when the defect is a ditch dug by an aqueduct company acting under Gen. St. c. 65. *Merrill v. Wilbraham*, 11 Gray 154.

A daguerreotype saloon at the side of the road, which frightens a horse, is not a defect within the meaning of this section. *Keith v. Easton*, 2 Allen 552.

Nor an object in the middle of the road, which has that effect, — for instance, a pile of gravel (*Kingsbury v. Dedham*, 13 Allen 186), or a dead horse. (*Cook v. Charlestown*, 13 Allen 190. — s. c. 98 Mass. 80.)

As to how far the slipperiness of a sidewalk from ice is a defect for which a town is liable, see *Stanton v. Springfield*, 12 Allen 566. — *Luther v. Worcester*, 97 Mass. 268. — *Hutchins v. Boston*, 12 Allen 571. — s. c. 97 Mass. 272. — *Johnson v. Lowell*, 12 Allen 572. — *Shea v. Lowell*, 8 Allen 136. — *Wilson v. Charlestown*, 8 Allen 137. — *Payne v. Lowell*, 10 Allen 147. — *Nason v. Boston*, 14 Allen 508.

A town will not be liable for injuries caused by the fall from the roof of a house of an overhanging mass of snow and ice. *Hixon v. Lowell*, 13 Gray 59, 61. But a town has been held liable for injuries caused by the fall of an awning erected over the sidewalk and caused to fall by an ordinary amount of snow. *Day v. Milford*, 5 Allen 98.

Whether it is a defect in a bridge that it is not able to support an elephant passing over, see *Gregory v. Adams*, 14 Gray 242.

*"Sufficient railing."* Towns are not obliged to maintain

railings or fences merely to prevent travellers from straying from the way. *Sparhawk v. Salem*, 1 Allen 30. Nor to prevent animals frightened by the cars on a neighboring railroad, from escaping from the highway. *Adams v. Natick*, 13 Allen 429. But the fact that the danger to be guarded against by the railing is not in the way or at its extreme limits, but a little beyond those limits, does not excuse a town from the duty of providing a railing. *Alger v. Lowell*, 3 Allen 402.

A town is not liable to one who, while stopping on the highway for the purpose of conversation, leans against a defective railing and is injured by reason of its insufficiency. *Stickney v. Salem*, 3 Allen 374.

*"If such county, &c., had reasonable notice of the defect," &c.* This provision was first inserted by St. 1850, c. 5, it having been held in *Brady v. Lowell*, 3 Cushing 121, that under the language used in the Revised Statutes, a party injured could in no case recover, unless the defect had existed for twenty-four hours.

*"If the same had existed for the space of twenty-four hours."* For cases in which the alleged defect was in a changeable condition during the twenty-four hours, see *Winn v. Lowell*, 1 Allen 177. — *Barber v. Roxbury*, 11 Allen 318.

In reckoning the twenty-four hours Sundays are to be included. *Flagg v. Millbury*, 4 Cushing 243.

SECT. 26. *"By reason of a deficiency."* The want of a sufficient railing is such a deficiency. *Hayden v. Attleborough*, 7 Gray 338, 343.

*"Town \* \* \* has made repairs."* Repairs made by the surveyors of highways are to be considered as made by the town within the meaning of this section. *Hayden v. Attleborough*, 7 Gray 338, 345.

It seems that the provisions of chapter 43, sections 82 and 83, do not limit the effect of this section. *Hayden v. Attleborough*, 7 Gray 338, 343.

## CHAPTER XLV.

## OF REGULATIONS AND BY-LAWS RESPECTING WAYS AND BRIDGES.

In cities, abutters on streets or ways who permit any portion of their land to be used by the public, &c., to keep the same in good condition, &c. St. 1867, c. 241.

Board of aldermen of Boston may designate the name by which any private way shall be known,— and penalty for the erection of signs, &c., giving another name. St. 1868, c. 199.

*Sidewalks.*

SECT. 9. Similar provision as to *towns* which adopt sections 7 and 8 of this chapter. St. 1863, c. 114.

*By-Laws.*

SECT. 14. If the by-laws are not posted up, damages may be recovered of the proprietors of the bridge by a person receiving an injury while violating such by-laws, unless he be proved to have had actual notice of the by-laws. *Worcester v. Essex Merrimack Bridge*, 7 Gray 457.

Governor and council may make by-laws for the regulation of travel on roads and bridges belonging to the commonwealth. St. 1864, c. 163.

## CHAPTER XLVI.

OF THE BOUNDARIES OF HIGHWAYS AND OTHER PUBLIC PLACES,  
AND ENCROACHMENTS THEREON.

Cities and towns may construct for their own use, and the board of aldermen of cities and the selectmen of towns may authorize individuals to construct for private use, lines of electric telegraph along highways and public roads. St. 1869, c. 457.

SECT. 1. "*Continued for more than twenty years.*" It will be sufficient if, though a portion of a fence has been moved, it is



shown to have remained in *substantially* the same place and line. *Hollenbeck v. Rowley*, 8 Allen 473, 474, 475.

*"Fronting upon or against a training field," &c.* As to the question whether a fence more or less near a highway is to be considered as coming within this statute, see *Sprague v. Wait*, 17 Pick. 309, 318.

*"Such fences or buildings."* It is not necessary that such fences, &c., should be still in existence at the time when the question arises. *Wood v. Quincy*, 11 Cush. 487, 496.

In the case of a Virginia fence a straight line drawn through the centre of the fence is to be deemed the true boundary. *Holbrook v. McBride*, 4 Gray 215.

*"Shall be deemed and taken to be," &c.* Such fence, &c., is conclusive and not merely *primâ facie* evidence of the true bounds. *Pettingill v. Porter*, 3 Allen 349. — *Plumer v. Brown*, 8 Met. 578.

*"No length of time less than forty years shall justify," &c.* But the maintaining of a fence within the limits of the highway for forty years will give to the owner as against the public an absolute right to maintain it there. *Cutter v. Cambridge*, 6 Allen 20.

This section does not repeal or alter the common law as to nuisances in the highway. *Commonwealth v. King*, 13 Met. 115.

SECT. 4. See *Hollenbeck v. Rowley*, 8 Allen 473, 476.

SECT. 6. *"Shade-trees standing," &c.* That is, standing when the General Statutes took effect (1 June, 1860). *White v. Godfrey*, 97 Mass. 472, 475.

SECT. 6-9. *Shade-trees.* No person shall cut down any ornamental or shade tree standing in any highway, town-way, or street, except after notice given to selectmen of town, &c. St. 1864, c. 242.

## CHAPTER XLVII.

## OF FERRIES.

SECT. 4. This provision does not exclude the common-law remedy. *Miller v. Pendleton*, 8 Gray 547.

## CHAPTER XLVIII.

## OF SEWERS AND DRAINS.

As to the liability of cities to keep sewers in order, see *Child v. Boston*, 4 Allen 41. — *Barry v. Lowell*, 8 Allen 127.

SECT. 1-3. These sections repealed and superseded by St. 1869, c. 111.

SECT. 4-7. As to the constitutionality and general effect of these provisions, see *Wright v. Boston*, 9 Cush. 233.

---

TITLE XIII.

## OF THE REGULATION OF TRADE IN CERTAIN CASES.

Act establishing a system of public warehousing. St. 1860, c. 206.

Common carriers to receive, forward, and transport all property offered them by other common carriers as promptly, faithfully, and impartially, at as low rates of charges, &c., &c., as for others. St. 1869, c. 252.

## CHAPTER XLIX.

OF THE INSPECTION AND SALE OF PROVISIONS AND OTHER  
MERCHANDISE.

The provisions of this chapter prohibiting certain sales, &c., do not apply to sales *made* out of the commonwealth, though

the articles sold are in the commonwealth at the time of sale. *Hardy v. Potter*, 10 Gray 89.

Act to establish the standard weight of *timothy or herds-grass seed*. St. 1862, c. 134.

Acts relating to the inspection and sale of *coal and petroleum oils*, and of petroleum and its products. St. 1869, c. 152. — St. 1869, c. 345. — St. 1867, c. 286. — St. 1866, c. 285. — St. 1866, c. 262. — St. 1865, c. 244.

Acts for the inspection of *gas and gas meters* and the protection of consumers and the protection and regulation of *gas-light companies*. St. 1861, c. 168. — St. 1864, c. 296.

Act regulating the manufacture and sale of *commercial fertilizers*. St. 1869, c. 63.

Act regulating the sale of *cotton sewing thread*. St. 1869, c. 120.

#### *Fish.*

SECT. 37. Each quality of fish, as specified under this section, is to be "regarded as a distinct kind of merchandise, and, when made the subject of a contract of sale, each grade stands on the same footing in relation to the other grades as if it was an article of an entirely different species." *Gardner v. Lane*, 12 Allen 39, 48.

SECT. 44. Amended by striking out the words "of rift timber." St. 1867, c. 3.

SECT. 60. Repealed and superseded by St. 1867, c. 347.

#### *Hay.*

SECT. 72-83. All these provisions relating to the inspection, weighing, branding, and sale of pressed or bundled hay, shall apply also to pressed or bundled *straw*. St. 1861, c. 67.

#### *Leather, Boots, &c.*

The buyer and manufacturer of leather may, by agreement, waive inspection, measurement, and sealing of leather. St. 1866, c. 236, s. 4.

SECT. 109. Amended by St. 1866, c. 236, s. 1.

SECT. 113. Measurer may act in another place, &c. St. 1866, c. 236, s. 2. Penalty for selling upper-leather not measured, &c. St. 1866, c. 236, s. 3.

SECT. 116. This section leaves it optional with the manufacturer to stamp the articles or not, as he may see fit. But it imposes no duty or obligation on him which is violated by a sale of articles which are not stamped. *Clark v. Oliver*, 3 Allen 336.

*Lumber, Ornamental Wood, and Ship Timber.*

SECT. 126. Towns of Medford, Brookline, and Watertown added to the district referred to in this section. St. 1865, c. 115, s. 2.

SECT. 141. The fees fixed by this section at 24 cents per thousand feet to be 30 cents. Excess of fees of surveyor-general over \$3,200 in any year to be paid into state treasury. St. 1865, c. 115, s. 1.

SECT. 143. This does not apply to a sale made out of the state, though the lumber is in the state. *Hardy v. Potter*, 10 Gray 89.

*Marble.*

SECT. 145. All the provisions of this section made applicable to *soapstone* and *freestone*. St. 1862, c. 70.

*Milk.*

SECT. 148-151. For the present laws relative to the inspection and sale of milk, see St. 1864, c. 122. — St. 1867, c. 204. St. 1869, c. 150. (For other laws now repealed, see St. 1860, c. 165. — St. 1863, c. 140. — St. 1865, c. 194. — St. 1868, c. 263.)

*Pot and Pearl Ashes.*

SECT. 173. Repealed and superseded by St. 1867, c. 47.

*Wood, Bark, and Coal.*

SECT. 181. As to the meaning of this section, see *Colton v. King*, 2 Allen 317. It does not prohibit the sale of a quantity of wood piled upon and by the side of the land where it grew,

although not of either of the lengths here specified. Same case.

SECT. 182. This section does not apply to a sale of bark lying on the owner's land in the country. *Huntington v. Knox*, 7 Cush. 371.

SECT. 188, 189. Repealed and superseded by St. 1865, c. 191. (Previously amended by St. 1863, c. 171.)

SECT. 190. For a case of such an action, see *Levy v. Gowdy*, 2 Allen 320.

## CHAPTER L.

### OF SALES BY AUCTIONEERS, AND HAWKERS AND PEDLERS.

#### *Auctioneers.*

SECT. 9. This section "applies only to the act of sale, and, as it is a penal statute, it must be construed strictly. It does not, either in its terms or its spirit, prohibit other persons (than auctioneers) from appointing the time and place of a sale, advertising, giving notice to interested parties, and making adjournments." Per CHAPMAN, J., in *Hosmer v. Sargent*, 8 Allen 99.

An auctioneer "may employ all necessary and proper clerks and servants; and in the course of a protracted sale he may, undoubtedly, without a violation of law, relieve himself by employing others to use the hammer and make the outcry. But this should be done under his immediate direction and supervision. We do not mean, however, by this that he must be actually present during the whole time of the sale. An occasional absence would not subject his servant or substitute to the penalties of the statute. If the auctioneer really conducted the auction and made the sales, he might, within his authority, call to his aid such assistance as might be needed to transact the business in a convenient and proper manner; but he clearly could not appoint deputies to make sales at different places and

times in his absence." Per MORTON, J., in *Commonwealth v. Harnden*, 19 Pick. 482, 484.

*Hawkers and Pedlers.*

As to the constitutionality of these provisions, see *Commonwealth v. Ober*, 12 Cush. 493.

It is a violation of these provisions for a person to sell the prohibited goods from house to house at the request of the purchasers, although he may be travelling about in the exercise of some lawful employment, and without any previous intention of selling or exposing to sale such goods. But it is not a violation for an agent to go about delivering to traders in the country goods made by his principals in Boston, and which had been previously ordered of them by such traders; nor even to deliver, at the same time and under the same circumstances, a larger quantity of the same goods than they had previously ordered. *Commonwealth v. Ober*, 12 Cush. 493.

SECT. 13. This section not to be so construed as to include any articles of the growth and production of foreign countries. St. 1862, c. 178.

SECT. 15. A hawker or pedler may sell jewelry, &c., if he does not sell it *in his capacity* of hawker or pedler. *Commonwealth v. Bruckheimer*, 14 Gray 29.

SECT. 16. All licenses to hawkers and pedlers to bear date the day they are issued, and to continue in force one year from such date. St. 1864, c. 151, s. 1.

SECT. 20. \$50, instead of \$100, to be paid for special state licenses. St. 1864, c. 151, s. 2. Licenses may be granted to disabled soldiers and sailors without payment. St. 1866, c. 197.

*Additional.* To be the duty of constables and police officers to prosecute for violation of statutes relating to hawkers and pedlers, &c. St. 1864, c. 151, s. 3.

## CHAPTER LI.

## OF WEIGHTS AND MEASURES.

Weighers of boilers and heavy machinery to be appointed. St. 1863, c. 173.

Additional provisions relative to sealing of weights and measures, to take effect in cities and towns voting to accept the same. St. 1863, c. 179.

## CHAPTER LII.

## OF SHIPPING AND PILOTAGE.

*Pilots and Pilotage.*

See additional acts. St. 1862, c. 176. — St. 1863, c. 75.

For review of early laws on the subject of pilotage, see *Winslow v. Prince*, 6 Cush. 368.

*Ship-Owners, Mariners, and Charterers.*

With regard to these provisions, see an article in the *American Law Review*. Vol. I. p. 597.

SECT. 18. "*Beyond the amount of his interest.*" As to the time as of which the value of such interest is to be reckoned, see *Walker v. Boston Ins. Co.*, 14 Gray 288.

## CHAPTER LIII.

## OF MONEY, BONDS, BILLS OF EXCHANGE, AND PROMISSORY NOTES.

*Interest of Money.*

SECT. 3-5. These sections repealed. Six per cent to be the legal rate when there is no agreement for a different one. *Any rate of interest made lawful*, but no greater rate than six per cent recoverable, unless the agreement to pay it is in writing.

St. 1867, c. 56. (Prior to being repealed these sections were amended by St. 1863, c. 242. — Resolve 1865, c. 76.)

*Bonds.*

SECT. 6. See *Chapin v. Vermont & Mass. R.R. Co.*, 8 Gray 575.

*Bills of Exchange and Promissory Notes.*

SECT. 7. Fast and thanksgiving days "appointed or recommended by the governor of this state or by the president of the United States" added to the holidays named in this section. St. 1863, c. 182.

SECT. 10. "*In any action by an indorser,*" &c. Under the term "indorser" is embraced any holder of a note, although it passes to him by delivery merely without any indorsement. *Ingham v. White*, 4 Allen 412, 415.

"*Any matter shall be deemed,*" &c. This does not authorize the admission of evidence of declarations made by the promisee after he has indorsed the note. *Wheeler v. Rice*, 8 Cush. 205, 207.

"*Which would be a defence to a suit thereupon if brought by the promisee.*" See *Richards v. Fisher*, 2 Allen 527.

SECT. 11. "*Excepting places in Africa beyond the Cape of Good Hope and places in Asia and the islands thereof.*" This exception struck out by St. 1863, c. 201, s. 2.

SECT. 12. This section repealed by St. 1863, c. 201, s. 2.

SECT. 15. "No days of grace shall be allowed upon any check drawn upon a bank." St. 1862, c. 130, s. 1.

*Additional Provisions.*

"Orders and drafts for money, payable within this state, in which no time of payment is expressed, shall be deemed to be payable on demand." St. 1862, c. 130, s. 2.

The drawer of a bill or draft requiring acceptance, to have till two o'clock P.M. on next business day after presentment to decide whether he will accept. St. 1860, c. 197.

In actions on contracts for the payment of money out of the



United States, excepting on bills of exchange, the current rate of exchange when the contract falls due, with interest, to be recovered. St. 1863, c. 201, s. 1.

Provision for depositing in any post-office in the city of Boston notices to parties having their residence or place of business in that city, of the non-acceptance or non-payment of negotiable instruments. St. 1868, c. 265.

## CHAPTER LIV.

### OF AGENTS, CONSIGNEES, AND FACTORS.

SECT. 2. "*Contract \* \* \* for the sale,*" &c. This section does not authorize a *pledge* or *mortgage*. *Michigan State Bank v. Gardner*, 15 Gray 364, 374.

SECT. 4. This section relates "to consignees and factors, but not to lessees; and to deposits and pledges, but not to mortgages. And as the statute is in derogation of the rights of owners, and gives effect to fraudulent transfers, as against the owners, it is not to be extended by construction." CHAPMAN, J., in *Stevens v. Cunningham*, 3 Allen 491, 493.

"*With an authority to sell,*" &c. A subsequent authority to sell will not render the title of a prior pledgee valid. *Nickerson v. Darrow*, 5 Allen 419.

## CHAPTER LV.

### OF LIMITED PARTNERSHIPS.

SECT. 2. "*Actual cash payment.*" As to what is meant by this, see *Pierce v. Bryant*, 5 Allen 91, 92.

SECT. 3. The following would seem to be a proper form for a certificate as required by this section.

## CERTIFICATE.

The undersigned hereby certify that in accordance with the provisions of the fifty-fifth chapter of the General Statutes of the commonwealth of Massachusetts, they have formed a limited partnership to be conducted under the name of B. & D., in which A. B. and C. D., whose places of residence are at Boston in said commonwealth, are the general partners, and E. F., whose place of residence is at Dedham in said commonwealth, is the special partner, and the said E. F. has contributed to the common stock the sum of ten thousand dollars in actual cash payment. Said partnership is formed for the purpose of importing and jobbing dry goods, and is to commence on the first day of July, A.D. 1869, and to terminate on the thirtieth day of June, A.D. 1872.

A. B.,  
C. D.,  
E. F.

## COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

2d July, 1868.

Then personally appeared the above-named A. B., C. D., and E. F., and severally acknowledged the above certificate to be their free act, before me.

X. Y., *Justice of the Peace.*

SECT. 4. "*Shall be liable as general partners for all the engagements thereof.*" See *Pierce v. Bryant*, 5 Allen 91, 98.

SECT. 11. "*Subject to all the liabilities,*" &c. One of these is the liability to be made subject to proceedings in insolvency as a member of the firm. *Lancaster v. Choate*, 5 Allen 580, 589.

## CHAPTER LVI.

## OF THE UNAUTHORIZED USE OF TRADE-MARKS AND NAMES.

SECT. 3. For a case where the court granted an injunction, upon the application of the executors of one deceased, to prevent his former partners from using his name in their business and firm after his death, see *Bowman v. Floyd*, 3 Allen 76.

SECT. 4. For cases of applications for injunctions to prevent the use of a trade-mark, see *Ames v. King*, 2 Gray 379. — *Bowman v. Floyd*, 3 Allen 76.

## TITLE XIV.

OF CORPORATIONS AND PROPRIETORS OF COMMON LANDS.

OF *co-operative associations* for chemical or agricultural purposes. St. 1866, c. 290 — St. 1867, c. 264.

## CHAPTER LVII.

OF BANKS AND BANKING.

All notes upon this chapter, except so far as they relate to savings banks, are omitted, as the state bank system has been substantially superseded by the United States national banks.

See, however, “an act in relation to suits in which state banks are parties.” St. 1869, c. 437.

*Savings Banks.*

Act to provide for the appointment of a *commissioner of savings banks*. St. 1866, c. 192.

For acts relative to the taxation of savings banks and depositors therein, see notes to chapter 11, s. 16.

SECT. 138. “Savings banks and institutions for savings may hold their *annual meetings* at the times fixed by their by-laws, any thing in their charters to the contrary notwithstanding.” St. 1864, c. 126.

“The person acting as clerk of any meeting of a savings bank for the election of officers, shall, within thirty days after such meeting publish in some newspaper published within the county where the savings bank is situated, a list of all persons who accept the offices to which they are elected at such meeting.” St. 1868, c. 49.

SECT. 142. Additional modes of investment allowed by St. 1863, c. 175, s. 1, 4. — St. 1863, c. 234. — St. 1864, c. 2, s. 1. — St. 1868, c. 227. “The Provident Institution for

Savings in the Town of Boston," is subject to these provisions, see Opinion of Justices, 9 Cush, 604.

SECT. 143. "*More than one-half the capital stock of any bank.*" The word "bank" altered to "corporation" by St. 1863, c. 175, s. 2.

SECT. 144. Deposits on call in certain national banks authorized. St. 1864, c. 2, s. 2.—St. 1868, c. 227.

"*Sums not to exceed seven per cent.,*" &c. Percentage that may be deposited increased from "*seven*" to "*twelve*." St. 1863, c. 175, s. 3.

SECT. 148. Return required by this section to be made to the commissioner of savings banks instead of to the secretary of the commonwealth. St. 1866, c. 192, s. 10.

Additional statements to be included in returns. St. 1862, c. 120.—St. 1867, c. 203, s. 1.

Returns of amounts of deposits on first days of March and November, and of average amount of deposits for preceding six months, to be made semiannually to the treasurer of the commonwealth. St. 1862, c. 224, s. 8, 9.

SECT. 149. Blank forms of the annual returns to be furnished by the secretary of the commonwealth. St. 1867, c. 203, s. 2.—(St. 1866, c. 192, s. 10.)

Commissioner of savings banks required to prepare the abstracts mentioned in this section. St. 1866, c. 192, s. 10.

SECT. 150, 152. No savings bank required to make any return of deposits in accordance with these sections, but only of collaterals held. St. 1862, c. 224, s. 12.

## CHAPTER LVIII.

### OF INSURANCE COMPANIES.

#### *Insurance Commissioners.*

SECT. 1. One insurance commissioner substituted for the board. His powers, duties, &c. St. 1866, c. 255.

Commissioner to make annual report of the receipts and expenses of his department. Also to give bond. St. 1867, c. 267, s. 9.

SECT. 6. Injunction to be applied for when an insurance company has exceeded its powers or failed to comply with the law. St. 1862, c. 145.

*"Such justice shall forthwith issue the injunction," &c.* Discretionary power given to justice to issue injunction *forthwith* or *after notice*. St. 1862, c. 131.

SECT. 10. Publication of any part of annual statements may be prevented until annual report is made to legislature. St. 1864, c. 220.

SECT. 11. As to salary and compensation of the insurance commissioner, see St. 1869, c. 434, s. 2. — St. 1866, c. 255, s. 2. — (St. 1860, c. 178 — St. 1862, c. 212. — St. 1867, c. 267, s. 8.)

Certain fees to be charged for papers filed in office of insurance commissioner. St. 1867, c. 267, s. 6.

As to salary of clerk of the insurance commissioner, see St. 1869, c. 434, s. 1. — (St. 1867, c. 167, s. 3. — St. 1866, c. 255, s. 1.)

#### *General Provisions.*

Charters of fire-insurance companies, which cease to do business for one year, to become extinct. Supreme court may determine the time within which such companies shall settle and close their concerns. St. 1863, c. 249, s. 1, 2.

Insurance companies forbidden to issue policies for periods extending beyond their term of incorporation. St. 1864, c. 277.

SECT. 16. May provide by by-law for the election of a vice-president. St. 1864, c. 113.

SECT. 24. Life-insurance companies may issue policies for more than seven years. St. 1861, c. 189.

Fire policies to express all conditions of insurance, and neither application nor by-laws to be considered a warranty

or part of the contract except so far as they are incorporated in full into the policy, and so appear on its face before the signatures of the officers. (St. 1861, c. 152).—St. 1864, c. 196.

SECT. 25. For further provisions relative to returns by insurance companies, see St. 1862, c. 224, s. 6, 7, 9.—St. 1867, c. 267, s. 2. 3.

*Companies having Specific Capitals.*

SECT. 27. As to proxy voting by *officers*, see St. 1865, c. 286.

SECT. 30. For the examination required by this section the company shall pay \$30 into the treasury of the commonwealth. St. 1867, c. 267, s. 4.

SECT. 31. Capital stock may be invested in national banks in certain cases. St. 1864, c. 29.

SECT. 32. Policies may be signed by vice-president. St. 1864, c. 113, s. 2.

SECT. 33. When, after setting aside, &c., the cash assets of a company do not amount to more than three-fourths of its original capital, the stock shall be assessed, &c. St. 1863, c. 249, s. 7-9.

Judgment must be obtained against the company before a suit can be maintained against the directors under this section. *Kinsley v. Rice*, 10 Gray 325.

See also case cited in note to section 38 of this chapter.

*Mutual Marine and Mutual Fire and Marine Companies.*

No insurance company chartered after 1868 with authority to effect marine insurance on the mutual plan shall issue policies until at least one-half of the subscribed capital or safety fund is paid in in cash,—and the provisions of law relating to the capital of joint-stock insurance companies shall be applicable to the cash capital of such mutual companies. St. 1868, c. 317, s. 3.

SECT. 38. This section does not render the policy void in cases where the president and directors are rendered liable. *Clark v. Brown*, 12 Gray 355.

See also case cited in note to section 83 of this chapter.

*Mutual and Stock and Mutual Fire Companies.*

Penalty upon officer of mutual fire insurance company giving guaranty to policy-holder against assessment. St. 1860, c. 149.

SECT. 43. Director shall not cease to be such by the canceling of his policy. St. 1862, c. 181, s. 5.

*"Who shall manage and conduct the business thereof."* See *Citizens' Mut. Fire Ins. Co. v. Sortwell*, 8 Allen 217, 222.

As to proxy voting by officers, see St. 1865, c. 236.

SECT. 48. Directors, creditors, &c., may in certain cases apply to supreme court to make, amend, or annul assessments. St. 1862, c. 181, s. 1-3. — St. 1864, c. 161, s. 2.

Supreme court may in certain cases stay the collection of assets. St. 1864, c. 161, s. 1.

Further provision making directors liable when failing to lay and collect assessments. St. 1868, c. 317, s. 2.

*"Shall assess such sums as may be necessary."* See *People's Equitable Mut. Fire Ins. Co. v. Babbitt*, 7 Allen 235. — *Traders' Mut. Fire Ins. Co. v. Stone*, 9 Allen 483.

See also as to the proper mode of making assessments, *Traders' Mut. Equitable Fire Ins. Co., Petitioners*, 9 Allen 319. *Fayette Mut. Fire Ins. Co. v. Fuller*, 8 Allen 27, 33, 34.

SECT. 51. The term "liabilities" in this section "shall include a sum sufficient to reinsure all outstanding risks." St. 1863, c. 249, s. 6.

*"At the expiration of his policy."* A policy-holder will be entitled to his share of the profits, even when his policy has become void by the alienation of the insured property without the consent of the company. *Merrifield v. Baker*, 9 Allen 29, 34.

SECT. 52. No lien to be created, as provided in this section, after April 30th, 1862. St. 1862, c. 181, s. 4.

As to the mode of proceeding to enforce a lien under this section when the party insured has obtained a discharge in insolvency, see *Bowditch Mut. Fire Ins. Co. v. Jackson*, 12 Gray 114.

SECT. 53. When company is in danger of becoming insolvent, directors to make two assessments, &c. St. 1863, c. 249, s. 4, 5.

SECT. 54. No assessment referred to in this section "shall be valid against any person who has not been duly notified thereof, in writing, within two years after the expiration or cancellation of his policy." St. 1865, c. 10.

"*In a book kept for that purpose.*" The book need not be kept for that purpose solely. *Citizens' Mut. Fire Ins. Co. v. Sortwell*, 10 Allen 110, 112.

"*Signed by the directors voting.*" See *Citizens' Mut. Fire Ins. Co. v. Sortwell*, 10 Allen 110, 112.

As to the proper form of the statement referred to in this section, see *Fayette Mut. Fire Ins. Co. v. Fuller*, 8 Allen 27, 33.

*Life-Insurance Companies.*

Act regulating the forfeiture of policies of life-insurance companies for non-payment of premium. St. 1861, c. 186.

Life-insurance companies not to issue policies when their net assets are not equal to their liabilities. St. 1863, c. 148.

Act relating to the distribution of surplus funds of life-insurance companies. St. 1866, c. 33.

SECT. 62. See an act to secure to married women policies of life insurance *assigned for their benefit*. St. 1864, c. 197.

As to the rights of children in a policy when the wife dies before the husband, see *Brown v. Brightman*, 11 Allen 224.

As to the rights of an *assignee* of a policy made payable "to the assured, his executors, administrators, and assigns," but expressed to be "for the use of his wife and children alive at



his decease," see *Burroughs v. State Mut. Life Ass. Co.*, 97 Mass. 359.

When a policy is expressed, in accordance with this section, to be for the benefit of the wife of the assured, he cannot by his will affect the distribution of the proceeds thereof. His administrator or executor will be entitled to collect the amount of such policy, but will hold the amount so collected, not as general assets of the deceased, but in trust to be paid over to the widow and children. *Gould v. Emerson*, 99 Mass. —.

An assignment of such a policy, though made by the wife with the consent of her husband and the insurers, will not, if she dies before her husband, affect the rights of her children to the proceeds thereof. *Knickerbocker Life Ins. Co. v. Weitz*, 99 Mass. —.

#### *Foreign Companies.*

Laws relative to foreign companies made applicable to foreign *individuals and associations*, whether incorporated or not. St. 1867, c. 267, s. 1. — St. 1868, c. 317, s. 1.

Foreign companies to pay certain sums into the treasury of the commonwealth. St. 1867, c. 267, s. 4.

No agent, &c., of foreign insurance company to commence business without obtaining certificate. St. 1867, c. 267, s. 5.

SECT. 66. As to who are to be deemed *agents* of foreign insurance companies, see St. 1864, c. 114, s. 1. See also *Roche v. Ladd*, 1 Allen 436. Also note to section 77 of this chapter.

For a case where the contract for insurance was made with a resident of this state acting in behalf of a non-resident, see *Williams v. Cheney*, 8 Gray 206.

"No foreign insurance company, with specific capital, shall be permitted to do business in this commonwealth unless it complies with the provisions of" St. 1863, c. 249, s. 7. St. 1863, c. 249, s. 10.

SECT. 68. Agent to be personally liable for all taxes imposed on the company. St. 1864, c. 114, s. 3.

*"Before doing business in this state."* As to what constitutes "doing business," see *Nat. Mut. Fire Ins. Co. v. Pursell*, 10 Allen 231, 232.

*"Service upon said agent shall be deemed sufficient service upon the principal."* As to service upon the agent, see *Thayer v. Tyler*, 10 Gray 164. — *Gillespie v. Commercial Mut. Mar. Ins. Co.*, 12 Gray 201.

As to the extent of the jurisdiction over foreign insurance companies given to our courts by this section, see *Smith v. Mut. Life Ins. Co.*, 14 Allen 336, 340.

SECT. 69. Agent also to give bond to pay taxes. St. 1862, c. 224, s. 10.

SECT. 71. So much of this section as requires the publication of a copy of the statement, repealed. St. 1867, c. 267, s. 7.

If a proper statement is not made, &c., the company cannot maintain an action in this state to recover assessments. *Washington Mut. Ins. Co. v. Hastings*, 2 Allen 398.

SECT. 72. *"The contract shall be valid."* This gives validity, not only to the policies issued, but also to the premium notes, and renders the makers of such notes liable upon them, except in the cases provided for in the last clause of this section. *Provincial Ins. Co. v. Lapsley*, 15 Gray 262, 263. — *Lester v. Webb*, 5 Allen 569, 574.

*"Shall not recover, \* \* \* until the provisions of this chapter are complied with."* But after such compliance it may recover. *Nat. Mut. Fire Ins. Co. v. Pursell*, 10 Allen 231.

SECT. 74. Agents not complying with the laws to be personally liable on all contracts of insurance made by or through them. St. 1864, c. 114, s. 2.

SECT. 77. As to who is to be deemed an "agent" within the meaning of this section, see St. 1861, c. 170. See also note to section 66 of this chapter.

#### *Forms.*

Companies having policies in separate classes shall specify the amounts in each class. St. 1862, c. 181, s. 6.

*Form B.*

In the 13th item the words "and in bank" struck out. St. 1860, c. 156.

*Form C.*

This form repealed and superseded by St. 1862, c. 181, s. 6. (Previously altered by St. 1860, c. 156, s. 1.)

*Form D.*

The 14th item struck out and in lieu thereof the following inserted. "How much included in the foregoing statements of assets consists of premium notes on policies not returned as now in force?" St. 1860, c. 156, s. 2.

## CHAPTER LIX.

### OF LOAN AND FUND ASSOCIATIONS.

With regard to the general nature of these associations, see *Delano v. Wild*, 6 Allen 1. — *Barker v. Bigelow*, 15 Gray 130.

SECT. 9. This section does not affect the right of a member to sue the corporation at law. *Fuller v. Salem and Danvers Loan and Fund Association*, 10 Gray 94.

## CHAPTER LX.

### OF MANUFACTURING AND OTHER CORPORATIONS ORGANIZED UNDER SPECIAL CHARTERS.

Officers and stockholders of manufacturing corporations not to be liable for the debts and contracts of such corporations except in certain specified cases. St. 1862, c. 218.

SECT. 4. "*Until others are chosen and qualified in their stead.*" See *Knowlton v. Ackley*, 8 Cush. 93. — *Chelmsford Co. v. Demarest*, 7 Gray 1.

"*The manner of such choice \* \* \* shall be prescribed by*

*the by-laws.*" This provision does not apply to the *first* choice of officers of a corporation. *Boston Acid Manuf. Co. v. Moring*, 15 Gray 211, 214.

SECT. 7. As to proxy voting by *officers*, see St. 1865, c. 236.

SECT. 12. "*Holders of such general stock shall be jointly and severally individually liable.*" As to the individual liability of stockholders, see St. 1862, c. 218, s. 2.

As to the validity of an agreement by a corporation to redeem within a certain time special stock issued pursuant to this section, see *Allen v. Herrick*, 15 Gray 274, 281.

SECT. 13. No *seal* is necessary to the validity of the assignment. *Atkinson v. Atkinson*, 8 Allen 15, 19.

An assignment will not be valid as against a subsequent attaching creditor of the assignor, unless notice of the assignment be given to the corporation. *Blanchard v. Dedham Gas Light Co.*, 12 Gray 213. See also note to chapter 63, section 11.

SECT. 17. As to the individual liability of stockholders, see St. 1862, c. 218, s. 2.

A certificate duly made and recorded, as provided in this and the following section, is conclusive evidence of the facts stated in it so as to exempt the stockholders from personal liability. *Stedman v. Eveleth*, 6 Met. 114, 119, 123.

"*For all debts and contracts made by the company,*" &c. An individual will be liable for debts contracted while he was a stockholder, although he ceased to be such before the debt became payable. *Holyoke Bank v. Burnham*, 11 Cush. 183. But he will not be liable for debts contracted before he became a stockholder, if he ceased to be such before the debt became payable and action was brought. *Holyoke Bank v. Burnham*, 11 Cush. 183. But it seems that all who are stockholders at the time of action brought will be liable even for debts contracted prior to their membership. *Curtis v. Harlow*, 12 Met. 3.

SECT. 18. The following would seem to be a proper form for the certificate mentioned in this section: —

# 100 MANUFACTURING AND OTHER CORPORATIONS.

## COMMONWEALTH OF MASSACHUSETTS.

We, the undersigned, being the president, treasurer, clerk, and a majority of the directors of the WASHINGTON IRON COMPANY, a corporation duly established by law at Boston in said Commonwealth, hereby certify that the whole amount of the capital stock of the said corporation, as fixed and limited by it according to law, is one hundred thousand dollars, all of which has been paid in, the last payment having been made on the 20th instant.

Witness our hands this thirtieth day of June, A.D. 1868.

5 cent  
Stamp.

R. S., *President.*  
J. B. T., *Treasurer.*  
J. S., *Director.*  
W. P., „  
U. C., „  
X. Y., *Clerk.*

SUFFOLK, ss.

30 June, 1868.

5 cent  
Stamp.

Then personally appeared the above-named R. S., J. B. T., J. S., W. P., U. C., and X. Y., and severally made oath that the foregoing certificate by them subscribed is true, before me.

W. X., *Justice of the Peace.*

SECT. 20-30. As to the individual liability of officers and stockholders, see St. 1862, c. 218, s. 1, 2.

SECT. 23. The following would seem to be a proper form for the notice required by this section. As the statute says that the "company" "shall give notice," it would seem advisable that a vote ordering the publication of the notice should be passed at a meeting of the directors of the company.

## NOTICE.

The WASHINGTON IRON COMPANY, a corporation duly established by law at Boston in the Commonwealth of Massachusetts, hereby gives notice, in accordance with the requirements of the statutes of said Commonwealth, that the amount of all assessments voted by said corporation is one hundred thousand dollars, all of which has been actually paid in, and that the amount of all existing debts of the said corporation is twenty-five thousand dollars.

5 cent  
Stamp.

U. C., *President.*  
F. W. L.,  
O. N.,  
L. M. S.,  
J. H. T.,  
} *Majority of  
Directors.*

BOSTON, 30th June, 1868.

SECT. 27. *It seems*, that the payment of dividends and preferred debts in insolvency out of the estate of the corporation does not free the directors from liability under this section. *Merchants' Bank v. Stevenson*, 10 Gray 232.

"*The directors under whose administration it occurs.*" See *Merchants' Bank v. Stevenson*, 5 Allen 398, 403.

SECT. 30. "*Knowing it to be false.*" See *Stebbins v. Edmands*, 12 Gray 203.

SECT. 31-34. These sections relative to the means of enforcing the personal liability of officers and stockholders of corporations have been repealed and superseded by St. 1862, c. 218, s. 3-10.

SECT. 35. As to the right of officers or stockholders paying the debts of the corporation, to contribution from other officers or stockholders, see *Cary v. Holmes*, 2 Allen 498. — *Stone v. Fenno*, 6 Allen 579.

## CHAPTER LXI.

### OF CORPORATIONS ORGANIZED UNDER GENERAL STATUTES.

As to the personal liability of officers and stockholders of corporations organized under general statutes, see St. 1862, c. 218. — St. 1863, c. 246.

SECT. 1. *Agricultural and horticultural* business added to those named in this section. St. 1862, c. 182.

As to the rights of a party who signs the articles of agreement, but delays to pay for his stock, see *Perkins v. Union Button Hole and Emb. Mach. Co.*, 12 Allen 273.

"*Shall be and remain a corporation.*" "Until the organization is complete according to the requirements of the statute, the association does not become a corporation, and does not possess corporate rights or privileges, nor is it subject to the duties and liabilities of a manufacturing corporation, among which is the liability of the stockholders for corporate debts if certain

provisions of law are not complied with." Per BIGELOW J. in *Utley v. Union Tool Co.*, 11 Gray 139, 141. But the rule is different in the case of a defective organization under a charter. *Newcomb v. Reed*, 12 Allen 362, 363. — *Walworth v. Brackett*, 98 Mass. 98, 100.

It is not a condition precedent to the existence of the corporation that its treasurer should have given bond according to law. *Boston Acid Manufacturing Co. v. Moring*, 15 Gray 211, 214.

A corporation organized under this chapter, which has assumed liabilities and held itself out as a corporation, cannot set up as a defect in its organization, in order to defeat an action against it, either the incorrectness of certificates made by it pursuant to the statutes, or its failure to make or publish the certificates required by law. *Dooley v. Cheshire Glass Co.*, 15 Gray 494.

SECT. 2. "*Distinctly and definitely specified.*" See *Bird v. Daggett*, 97 Mass. 494, 496.

The following would seem to be a proper form for articles of agreement under this chapter : —

Articles of agreement made and executed this second day of June, A.D. 1868, by and between A. B., C. D., and E. F., all of Boston in the Commonwealth of Massachusetts.

Know all men that we, the said A. B., C. D., and E. F., do hereby associate ourselves together pursuant to the provisions of the statutes of said Commonwealth for the purpose of carrying on the business of manufacturing nails and iron as a corporation under the name of the WASHINGTON IRON COMPANY, said corporation to be established in said city of Boston and to have a capital stock of one hundred thousand dollars, divided into one thousand shares of the par value of one hundred dollars each.

Witness our hands and seals the day and year first above written.

5 cent Int. Rev. Stamp.
-------------------------------

A. B. [SEAL.]  
C. D. [SEAL.]  
E. F. [SEAL.]

SECT. 3. See Gen. St. c. 68, s. 4, which provides that the notice shall be signed by a "*majority*" instead of by "*one or more*," as in this section.

The following would seem to be a proper form for a notice under this section.

## NOTICE.

The first meeting of the WASHINGTON IRON COMPANY, a corporation organized under the general statutes of Massachusetts, will be held on Thursday, the tenth instant, at ten o'clock A.M., at the office of X. Y., No. 19 Court Street, Boston, for the purpose of electing officers, adopting a code of by-laws, fixing the distribution of the capital stock and laying assessments thereon, and transacting all such other business as may be necessary or convenient for the complete organization of said corporation.

A. B. } *A majority of the persons named*  
E. F. } *in the Articles of Agreement.*

Boston, 2d June, 1868.

SECT. 5. As to the personal liability of officers and stockholders, see St. 1862, c. 218, s. 1, 2.

The following would seem to be a proper form for the certificate mentioned in this section : —

## COMMONWEALTH OF MASSACHUSETTS.

We, the undersigned, being the president, treasurer, and a majority of the directors of the WASHINGTON IRON COMPANY, hereby certify, in accordance with the requirements of the statutes of this Commonwealth, that the said WASHINGTON IRON COMPANY is a corporation established at Boston in said Commonwealth for the purpose of carrying on the business of manufacturing nails and iron; that the amount of the capital stock of the said corporation is one hundred thousand dollars, all of which has been actually paid in, and that the par value of the shares in said corporation is one hundred dollars each.

Witness our hands this twenty-eighth day of June, A.D. 1868.

5 cent  
Stamp.

R. S., *President.*  
J. B. T., *Treasurer.*  
J. S., *Director.*  
W. P.,     "  
U. C.,     "

SUFFOLK, ss.

28th June, 1868.

5 cent  
Stamp.

Then personally appeared the above-named R. S., J. B. T., J. S., W. P., and U. C., and severally made oath that the foregoing certificate by them subscribed is true, before me —

X. Y., *Justice of the Peace.*



The certificate required by this section may be filed before any part of the capital stock has been paid in. *Boston Acid Manufacturing Co. v. Moring*, 15 Gray 211, 214.

SECT. 10. This section repealed and superseded by St. 1862, c. 210. — St. 1863, c. 246, s. 2. — (Previously amended by St. 1861, c. 121.)

SECT. 11. It seems that officers violating the provisions of section 2, or neglecting or refusing to perform the duties required by sections 8, 9, and 10, are no longer rendered personally liable thereby. St. 1862, c. 218, s. 1. — *Peele v. Phillips*, 8 Allen 86, 89. But by St. 1863, c. 246, s. 1, it was provided that St. 1862, c. 218, should not be construed to release the corporation or its officers "from their obligation to file the certificates and publish the notices required by" this chapter.

*Gas-light Companies.*

Officers of gas-light companies may enter premises lighted with gas and examine meters, &c. If gas consumers refuse to pay for gas, &c., the company may stop the gas, &c. Penalty for injuring meter, &c., preventing correct operation of meter, or fraudulently or unlawfully burning or using gas, &c. St. 1861, c. 168, s. 11-15.

SECT. 16. In case of injury from a defect in way caused by a gas company, such company shall be liable to repay to the town all damages recovered of it and taxable costs of both parties in the suit, provided, &c. St. 1860, c. 121.

The word "*lanes*" in the statute does not signify the land of individuals over which there is only a private right of way, but only such ways as the public have acquired a right to use. *Commonwealth v. Lowell Gas Light Co.*, 12 Allen 75, 77.

## CHAPTER LXII.

## OF TURNPIKE, CANAL, AND BRIDGE CORPORATIONS.

*Turnpikes.*

SECT. 5. Any person attempting to pass a turnpike gate, and claiming exemption from toll, must state at the time, if asked to do so, the grounds upon which the exemption is claimed. *Cleaveland v. Ware*, 98 Mass. 409, 413.

SECT. 6. The penalty here provided for goes to the commonwealth. *Gilmore v. Skiff*, 4 Cush. 508.

SECT. 12. A person not liable to the payment of toll cannot maintain an action for an injury sustained by him. *Williams v. Hingham & Quincy Bridge & Turnpike Co.*, 4 Pick. 341.

The corporation will be liable to indictment though no person may have been injured by the insufficiency or want of repair. *Commonwealth v. Hancock Free Bridge Co.*, 2 Gray 58, 68.

*Bridges.*

A bridge company is not bound to keep any part of its bridge covered with snow in sleighing time. *Chase v. Cabot and W. Springfield Bridge Co.*, 6 Allen 512.

## CHAPTER LXIII.

## OF RAILROAD CORPORATIONS.

“Act to establish a board of railroad commissioners.” St. 1869, c. 408.

(Prior act for the same purpose. St. 1864, c. 152. Repealed by St. 1865, c. 239, s. 3.)

The portion of a railroad in this state owned by a company chartered by the concurrent legislation of this and another state, shall be entitled to the benefits and subject to the liabili-

ties of railroad companies chartered by this state. St. 1860, c. 201, s. 2.

Act relative to commissioners appointed relative to railroads extending out of the state. St. 1864, c. 289.

As to the duty of railroad companies to run trains, &c., see *Commonwealth v. Fitchburg R.R. Co.*, 12 Gray 180.

*Organization, Officers.*

SECTS. 2, 3. Directors of railroad corporations may choose one of their number vice-president, with a salary. St. 1869, c. 50.

*Meetings, Votes.*

SECT. 4. Meetings must be held *annually* for election of directors. St. 1868, c. 212.

Annual meetings to be held at some convenient place on the line of the road. St. 1868, c. 106.

SECT. 6. As to proxy voting by *officers*, see St. 1865, c. 236.

*Capital Stock, Assessments, &c.*

SECT. 9. The provisions of this section for the sale of shares do not apply to the case of new shares offered to stockholders and sold because not taken by them. *Sewall v. Eastern R.R. Co.*, 9 Cush. 6.

As to the proper method of making a sale under this section, see *Lexington & W. C. R.R. Co. v. Staples*, 5 Gray 520.

As to the form of declaration in an action under this section for a deficiency, see *Amherst & Belchertown R.R. Co. v. Watson*, 4 Gray 61.

For another case of an action to recover a deficiency, see *Troy & Greenfield R.R. v. Newton*, 8 Gray 596.

SECT. 11. If the transfer is not recorded, the shares are liable to be taken on an execution against the vendor. *Rock v. Nichols*, 3 Allen 342.

But although not recorded, the transfer will still be valid to pass the title as between the parties. *Stone v. Hackett*, 12 Gray 227, 231.

See also notes to chapter 60, s. 13.

SECT. 12. Railroad companies may hold stock of certain steamship companies, provided, &c. St. 1868, c. 347.

*Location of Road.*

Land of state lunatic hospitals not to be taken without special act. St. 1862, c. 223, s. 2.

A deviation by a railroad corporation in one part of its location from the route fixed by statute will not invalidate other portions of its location which are within its true limits. *Newton v. Agricultural Branch R.R. Co.*, 15 Gray 27.

SECT. 18. A location will be sufficient if the boundaries are sufficiently shown by a plan referred to in it and filed with it. *Grand Junction R.R. & Depot Co. v. County Commissioners of Middlesex*, 14 Gray 553.

Such plan may be referred to to explain, but not to modify or control, the written location. *Hazen v. Boston & Maine R.R.*, 2 Gray 574.

The location filed is, as against the corporation, conclusive evidence of the land taken. *Hazen v. Boston & Maine R.R.*, 2 Gray 574.

*Taking Lands, &c.*

SECT. 20. For the law on the subject of this section prior to the St. 1853, c. 351, s. 3, see *Boston & Maine R.R. v. Cambridge*, 8 Cush. 237. — *Worcester v. Western R.R.*, 4 Met. 564.

*Damages.*

(Railroads to forfeit rights of location unless land claims are paid, &c., within three years. St. 1864, c. 293. Repealed except as to forfeitures already incurred by St. 1868, c. 56.)

SECT. 21. As to the subjects for which damages may be recovered, see *Boston & Worcester R.R. v. Old Col. R.R.*, 12 Cush. 605. — *Whitman v. Boston & Maine R.R.*, 7 Allen 313. See also cases cited in note to chapter 43, s. 16.

Certain damages are the proper subject of an action at law, not of an application to the county commissioners, — for instance, damages caused by the negligent or careless exercise of

rights granted by the charter of the railroad. *Miller v. Western R.R.*, 4 Gray 301. — *Estabrooks v. Peterborough & Shirley R.R.*, 12 Cush. 224.

SECT. 22. "*Within one year.*" When time for locating is extended, unsettled claims for land damages to be revived. *St. 1862, c. 103.*

SECT. 35. When the railroad applies for a jury and the amount of damages is reduced, each party pays his own costs. *Harvard Branch R.R. v. Rand*, 8 Cush. 218. When however after such deduction the railroad, being still dissatisfied, appeals to the supreme court, by which the amount found by the jury is established, the original petitioner will be entitled to recover the taxable costs of the appeal. *Commonwealth v. Boston & Maine R.R.*, 3 Cush. 25, 56.

*Construction.*

SECT. 42. As to the rights and duties of railroad companies in the matter of *fences*, see *Boston & Worcester R.R. v. Old Col. R.R.*, 12 Cush. 605, 608.

SECT. 43. "*Each corporation shall erect and maintain suitable fences.*" As to what fences are suitable within the meaning of this section, see *Eames v. Salem & Lowell R.R.*, 98 Mass. 560, 565.

The statute does not make a railroad company liable for injuries caused to animals by reason of the want of suitable fences, if such animals are wrongfully upon the land adjoining the railroad. *Eames v. Salem & Lowell R.R.*, 98 Mass. 560, 566.

As to the liability of the railroad company in case of neglect to maintain suitable fences, see also *Rogers v. Newburyport R.R.*, 1 Allen 16.

"*Which it shall have constructed subsequently,*" &c. See *Stearns v. Old Col. & F. R. R.R.*, 1 Allen 493.

SECT. 44. The corporation is not liable to *damages* for its neglect, and there is no legal authority for an assessment of damages against it, either by the commissioners or by a jury. *Vt. & Mass. R.R. v. County Commissioners of Franklin*, 10 Cush. 12, 16.

*Crossing Highways.*

No bridge to be constructed over a railroad at height of less than eighteen feet above the track, except by the written consent of county commissioners. Bridge guards to be erected at every bridge which is less than eighteen feet above the track. St. 1869, c. 308.

SECT. 46. "*Or other way.*" This does not include *private* ways. *Boston Gas Light Co. v. Old Col. & N. Railway Co.*, 14 Allen 444, 447.

The company may put down and maintain upon any part of the highway within the limits of its location such number of tracks as are essential to the convenient transaction of its business, and for that purpose may make any necessary alteration in the grade or surface of the highway there. *Commonwealth v. Hartford & New Haven R.R.*, 14 Gray 379, 380.

As to the right of a railroad company to lay out its road along a highway longitudinally, see *Springfield v. Conn. R. R.R.*, 4 Cush. 71, 72. — *Commonwealth v. Old Col. & F. R. R.R.*, 14 Gray 93, 95.

SECT. 47. A railroad may cross a highway on a level when authorized to do so by the county commissioners. St. 1865, c. 239, s. 1. — (See also St. 1864, c. 152, s. 2.)

SECT. 48. The railroad company is primarily liable for damages to estates caused by the raising or lowering of a highway, and such damages must be claimed within the three years allowed by section 29. *Gardiner v. Boston & Worcester R.R.* 9 Cush. 1.

SECT. 54. "*In an action of tort.*" In whose name such action should be brought. *Roxbury v. Boston & Providence R.R.*, 6 Cush. 424.

SECT. 58. See *Boston & Maine R.R. v. County of Middlesex*, 1 Allen 324. — *Old Colony & Fall River R.R. v. County Commissioners of Plymouth*, 11 Gray 512.

SECT. 59. "*Across a railroad.*" "The word *railroad*, as

used in this section, is to be interpreted as meaning all the land, not exceeding five rods in width, taken by a railroad corporation for their road, which is included within the location thereof filed according to law." *Commonwealth v. Haverhill*, 7 Allen 523, 524.

SECT. 61. "*With their approaches.*" See *Titcomb v. Fitchburg R.R.*, 12 Allen 254, 259. — *White v. Quincy*, 97 Mass. 430.

As to the liability of the corporation for want of repair, see *Sawyer v. Northfield*, 7 Cush. 490.

SECT. 63. A bill in equity under this section cannot be maintained by individuals, but only by the mayor and aldermen of the city or the selectmen of the town in which the crossing is situated. *Brainard v. Connecticut River R.R.*, 7 Cush. 506.

*Crossings in Private Lands.*

As to the right of an owner of land on both sides of a railroad track to cross over such track, see *Boston Gas Light Co. v. Old Col. & N. R.R.*, 14 Allen 444, 445.

Penalty for not securing gates, &c. at private crossings. St. 1862, c. 123.

*Drawbridges.*

Additional provisions relative to drawbridges. St. 1863, c. 131.

*Regulations for Operating Road.*

Passenger cars not to be lighted by naphtha or certain oils. St. 1868, c. 286.

SECT. 81, 82. Every car, except four-wheeled cars used only for the transportation of merchandise, to have a good and sufficient *brake*. St. 1869, c. 426.

SECT. 83. This section repealed and superseded by St. 1862, c. 81, s. 1.

SECT. 84. The words "while the bell rings," at the end of this section, struck out by St. 1862, c. 81, s. 2.

SECT. 85. For the origin of this section, see *Whittaker v. Boston & Maine R.R.*, 7 Gray 98.

SECT. 86. Gates or bars may be required by county commissioners. St. 1865, c. 239, s. 2.

SECT. 89. Flagman may be required by county commissioners. St. 1865, c. 239, s. 2.

SECT. 97. As to the *form* of an indictment under this section, see *Commonwealth v. Boston & Worcester R.R.* 11 Cush. 512. — *Commonwealth v. Eastern R.R.*, 5 Gray 473.

SECT. 98. As to the *form* of an indictment under this section, see *Commonwealth v. Fitchburg R.R.*, 10 Allen 189.

SECT. 99. This section applies exclusively to indictments against *railroad* corporations. *Commonwealth v. East Boston Ferry Co.*, 13 Allen 589, 590.

Time for finding new indictment extended in certain cases of abatement of a former one or of a reversal of the judgment thereon. St. 1867, c. 164.

SECT. 101. A railroad company which has leased its road to another company, will be liable for fire communicated by the engines of the lessee. *Ingersoll v. Stockbridge & Pittsfield R.R.*, 8 Allen, 438.

The fact that the building damaged stands, by the consent of the company, partly on its own land, does not affect the liability of the company. *Ingersoll v. Stockbridge & Pittsfield R.R.*, 8 Allen 438.

When a spark from an engine set fire to a shed, a spark from which set fire to another building of a different owner, it was held that such last building was "*injured by fire communicated by*" such engine. *Hart v. Western R.R.*, 13 Met. 99, 103. So when a spark from the engine set fire to grass, and the fire spread across lands of several different proprietors and across a highway to woodland half a mile distant. *Perley v. Eastern R.R.*, 98 Mass. 414.

For other cases arising under this section, see *Ross v. Boston & Worcester R.R.*, 6 Allen 87. — *Trask v. Hartford & New Haven R.R.*, 2 Allen 331.



*Accommodations for Passengers. — Tolls, &c.*

Railroad companies not to abandon passenger stations established for five years, nor to diminish the number of trains stopping at such stations, except by consent of legislature. St. 1865, c. 175.

Every railroad company to give to all persons and companies reasonable and equal terms, facilities, and accommodations, &c. St. 1867, c. 339.

Railroad companies required to carry United States mails when requested. Compensation how determined. St. 1867, c. 351.

SECT. 111. See *Najac v. Boston & Lowell R.R.*, 7 Allen 329. — *Commonwealth v. Connecticut River R.R.*, 15 Gray 447, 450.

SECT. 112. As to the origin of this section, see 2 Am. Law Rev. 28.

*Relations of Connecting Roads.*

SECT. 115. This section not to be construed as authorizing the leasing, &c., of railroads. St. 1867, c. 298. See *Durfee v. Old Col. & Fall River R.R.*, 5 Allen 230, 248.

SECT. 116. As to what damages and injuries are included in this section, see *Ingersoll v. Stockbridge & Pittsfield R.R.*, 8 Allen 438. — *Langley v. Boston & Maine R.R.*, 10 Gray 103, 104.

SECT. 117. For cases arising under the appointment of commissioners under this section, see *Boston & Worcester R.R. v. Western R.R.*, 14 Gray 253. — *Lexington & W. Cambridge R.R. v. Fitchburg R.R.*, 14 Gray 266. — *Vt. & Mass. R.R. v. Fitchburg R.R.*, 9 Cush. 369.

A railroad which, pursuant to this section, draws over its road cars belonging to a connecting road, is to be regarded as acting as a common carrier in performing such service, and will be held responsible as such for any injury to such cars while in its possession. *Vermont & Mass. R.R. v. Fitchburg R.R.*, 14 Allen 462, 469.

SECT. 117, 118. The board of railroad commissioners to have the powers and duties conferred and imposed by these sections upon commissioners appointed by the court. St. 1869, c. 408, s. 5.

SECT. 117-119. Any railroad company existing by the laws of another state shall have the rights given in these sections, over any connecting railroad in this state belonging to a corporation chartered by concurrent legislation of this and other state or states. St. 1860, c. 201, s. 1.

SECT. 119. As to the cause and intent of this section, see *Commonwealth v. Fitchburg R.R.*, 12 Gray 180, 187. — *Fitchburg R.R. v. Gage*, 12 Gray 393, 396.

#### *Bonds and Mortgages.*

Bonds and mortgages not issued in conformity with these provisions are void. *Commonwealth v. Smith*, 10 Allen 448, 457.

Act to authorize railroad corporations to issue *registered* bonds. St. 1869, c. 131.

SECT. 123. See *East Boston Freight R.R. v. Hubbard*, 10 Allen 459, 460.

#### *Returns and Reports.*

SECT. 132. "*Together with one thousand printed copies of the same.*" These words struck out by St. 1862, c. 135, s. 1.

Railroads, at time of furnishing their annual reports, to pay \$20 to secretary of the commonwealth. St. 1864, c. 167, s. 1, 2.

Lessee of leased roads to make reports, &c., instead of lessor. St. 1864, c. 167, s. 3. But lessor to make reports, &c., when lessee is a corporation or party in another state. St. 1867, c. 127.

After Dec. 1, 1869, no railroad to be excused for reason that it does not keep its books so as to make the returns required, and secretary of state and attorney-general required to enforce the provisions of the law. St. 1869, c. 419, s. 2.

Form of return here given amended by St. 1869, c. 419, s. 1.

SECT. 135. Further provisions as to penalty. St. 1863, c. 224, s. 2.

SECT. 136. Secretary shall cause railroad reports to be printed, bound, &c. St. 1862, c. 135, s. 2. — St. 1864, c. 167, s. 4.

Secretary to examine reports, give notice of errors, &c. St. 1863, c. 224.

*Rights of Commonwealth.*

SECT. 138. As to the effect of this section, see 2 Am. Law Rev. 28.

*Horse Railroads.*

SECT. 139-145. These sections superseded by St. 1864, c. 229, which with St. 1865, c. 261, — St. 1866, c. 286, — St. 1866, c. 294, and St. 1869, c. 306, constitute the present laws on the subject. (Other repealed or superseded laws on the subject are St. 1861, c. 199. — St. 1863, c. 100. — St. 1863, c. 223. — St. 1863, c. 224.) But quære, whether the latter part of sect. 1, of St. 1861, c. 199 be not still in force. See St. 1864, c. 229, s. 16.

## CHAPTER LXIV.

### OF TELEGRAPH COMPANIES.

For “an act in relation to city, town, and private telegraph lines,” see St. 1869, c. 457.

SECT. 2. This and the following section apply only to companies incorporated under the laws of this state. *Commonwealth v. Boston*, 97 Mass. 555, 558.

SECT. 3. The determination of the mayor and aldermen as to the places where the posts may stand is to be regarded as conclusive upon the rightfulness of their erection within the limits of a highway, so that they cannot lawfully be removed by

the city or by any other of its officers, or treated in any manner as a public nuisance. *Commonwealth v. Boston*, 97 Mass. 555, 557.

SECT. 10. Telegraph companies and associations shall transmit despatches received from other companies or by mail at the same rates as those received from individuals in person. St. 1867, c. 348.

*"According to the regulations of the company."* These regulations may limit the liability for errors, &c. *Ellis v. American Telegraph Co.*, 13 Allen 226.

SECT. 11. It seems to be a question whether, under this section, towns are liable for injuries arising out of the original placing of the poles, or only for those caused by their subsequent decay, falling over, &c. See *Commonwealth v. Boston*, 97 Mass. 555, 558. — *Young v. Yarmouth*, 9 Gray 386.

SECT. 13. This section subjects *foreign corporations*, as well as individuals and associations not incorporated, to the duties and liabilities imposed by section 10. *Ellis v. American Telegraph Co.*, 13 Allen 226, 230. But it does not give them a right to have their posts located under section 3. *Commonwealth v. Boston*, 97 Mass. 555, 559.

SECT. 16. Act authorizing the removal, &c., of telegraph wires in order to move buildings and for other purposes, upon notice given to the company. St. 1869, c. 141.

## CHAPTER LXV.

### OF AQUEDUCT CORPORATIONS.

SECT. 9. Towns are liable for injuries arising from the digging up of a street or way under this section. *Merrill v. Wilbraham*, 11 Gray 154.

SECT. 14. Additional provisions on the subject of this section. St. 1867, c. 158.

## CHAPTER LXVI.

### OF AGRICULTURAL AND HORTICULTURAL SOCIETIES.

The Bristol County Central Agricultural Society to be entitled to the benefits, &c., and subject to the duties, &c., of other agricultural societies receiving bounties. St. 1866, c. 189, s. 4.

SECT. 1. Agricultural societies receiving bounties to admit on equal terms citizens of every town in the county. St. 1861, c. 180.

Certain societies not entitled to bounties if their grounds are within twelve miles of the grounds of another society. St. 1866, c. 189, s. 1.

SECT. 4. Repealed by St. 1865, c. 90, which provides that societies receiving bounties shall make such rules and regulations in the distribution thereof as shall, in their opinion, best promote the improvement of agriculture, subject, however, to the restrictions of sects. 6–9 of this chapter.

SECT. 7. Premiums to be subject to the competition of every citizen of the county. St. 1861, c. 180.

SECT. 11. Such bounds can be lawfully fixed only for the purposes specially enumerated. *Commonwealth v. Ruggles*, 6 Allen 588.

Agricultural societies may make regulations for preserving peace, &c., at shows, &c. Booths, tents, &c., for the sale of goods not to be established within half a mile of shows, &c. Gaming, horse-racing, &c., at such shows, &c., forbidden. St. 1861, c. 127.

SECT. 15. This section repealed. State board of agriculture to prescribe rules with regard to premiums. St. 1862, c. 24.

SECT. 16. Times of annual exhibitions altered by St. 1860, c. 165. — St. 1861, c. 82. — St. 1861, c. 103. — St. 1862, c. 29. — St. 1862, c. 60. — St. 1863, c. 20. — St. 1865, c. 48. — St. 1866, c. 14.

The state board of agriculture authorized to fix the days on which the agricultural societies shall commence their annual exhibitions. St. 1866, c. 189, s. 3.

*Farmers' Clubs.*

May make regulations for preserving peace at shows. Booths, tents, &c., not to be erected within half a mile of their shows. Gaming, horse-racing, &c., at their shows forbidden. St. 1861, c. 127.

## CHAPTER LXVII.

### OF PROPRIETORS OF WHARVES, GENERAL FIELDS, AND REAL ESTATE LYING IN COMMON.

SECT. 17. As to the power of proprietors of common lands to *sell* their lands, see *Gloucester v. Gaffney*, 8 Allen 11, 13. — *Green v. Putnam*, 8 Cush. 21. — *Springfield v. Miller*, 12 Mass. 415, 416. — *Codman v. Winslow*, 10 Mass. 146. See also section 13 of this chapter, and *Rogers v. Goodwin*, 2 Mass. 475. It is to be noted that the word "*dispose*," used in the earlier statutes, was omitted in Rev. St. c. 43, s. 7, and Gen. St. c. 67, s. 13. See St. 1783, c. 39, s. 8.

## CHAPTER LXVIII.

### OF THE POWERS, DUTIES, AND LIABILITIES OF CORPORATIONS.

No certificate of stock to be issued, or dividend paid, by corporations to any shareholder whose residence is unknown or has become uncertain. St. 1864, c. 201, s. 1.

No railroad, telegraph, or gas-light company to declare stock dividend, or divide proceeds of sale of stock, among its stockholders, or to create new stock, unless the par value thereof is first paid in cash to its treasurer. St. 1868, c. 310.

No officer of a corporation to cast, as proxy or attorney, more than twenty votes, unless for one person. No *salaried*

officer to cast any vote as proxy or attorney. No officer to ask for, receive, procure to be obtained, or use any proxy vote except as above. Any officer offending, subject to fine, and upon petition supreme court shall remove him from office, and such removal shall forever disqualify him as an officer in that corporation. St. 1865, c. 236.

Provision for defence by stockholder of suit against a corporation, where the object of the suit is to enforce the judgment against the stockholder. St. 1867, c. 36.

Certain *returns* to the treasurer of the commonwealth required of corporations. St. 1864, c. 208. — St. 1865, c. 283.

Shares in corporations organized after May 10, 1867, except co-operative associations under St. 1866, c. 290, and herring-fisheries under St. 1866, c. 187, to be fixed at \$100 each. St. 1867, c. 131. (Act fixing the par value of stock in all corporations at \$100. St. 1860, c. 128. Repealed by St. 1862, c. 88.)

(Act requiring corporations to pay tax on dividends of stockholders living out of the state. St. 1863, c. 236. Repealed by St. 1864, c. 208, s. 18. Taxes paid, required to be refunded by St. 1867, c. 42.)

As to the power of a corporation to form a partnership with an individual, see *Whittenton Mills v. Upton*, 10 Gray 582.

As to the power of a railroad corporation to mortgage its franchise, see *Richardson v. Sibley*, 11 Allen 65.

The holders of stock in a supposed corporation, which being defectively organized has no legal existence as such, do not thereby become liable as partners. *Fay v. Noble*, 7 Cush. 189.

Cases upon the personal liability of stockholders. *Handrahan v. Cheshire Iron Works*, 4 Allen 396. — *Mason v. Cheshire Iron Works*, 4 Allen 398.

SECT. 1. *Foreign* corporations, equally with domestic corporations, may sue in personal actions in this state. *Portsmouth Livery Co. v. Watson*, 10 Mass. 91.

SECT. 3. “*Signed by \* \* \* a majority of the persons,*” &c.

If the notice is not signed by a majority, it does not necessarily affect the validity of the organization of a corporation incorporated by special charter. *Newcomb v. Reed*, 12 Allen 362. — *Walworth v. Brackett*, 98 Mass. 98. — *Chester Glass Co. v. Dewey*, 16 Mass. 94, 101. — *Narragansett Bank v. Atlantic Silk Co.* 3 Met. 282, 287.

SECT. 4. "*Signed by a majority*," &c. See chapter 61, s. 3, which provides that the notice may be "signed by *one or more* of the persons named."

SECT. 5. The following will serve as a form for proceedings under this section.

To E. S. R., Esq., a justice of the peace throughout the Commonwealth of Massachusetts.

The subscribers, members of the ———, a corporation duly established under the laws of the said Commonwealth, respectfully represent :

That by reason of the defective organization of the said corporation, there is no person duly authorized to call or preside at a legal meeting of the same.

They therefore pray that you will issue a warrant to one of their number, directing him to call a meeting of the said corporation, by giving such notice as is required by law, for the following purposes : —

1st. To elect officers of the said corporation.

2d. To confirm the records and the acts and doings of the said corporation, as shown by said records.

3d. To authorize the treasurer to borrow the sum of ten thousand dollars for the use of the corporation, to sign a note as treasurer, and in the name of the corporation, for the said amount, and in due form of law to make and execute a mortgage of the real estate of the said corporation to secure the said amount, to affix thereto the corporate seal, and to do all other things necessary to give validity and effect to said mortgage.

4th. To transact any other business which may be brought before the said meeting.

A. B.

C. D.

E. F.

---

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

To A. B., of Boston, in said County.

Pursuant to the foregoing petition, I hereby direct you to call a meeting of the ———, to be held at ———, on Thursday, the fifth day of November



next, at seven o'clock in the evening, and I hereby direct you to give notice of such meeting, by causing a copy of the said petition and of this warrant to be published, at least seven days before the day of meeting, in the "Boston Daily Advertiser," a newspaper published in said Boston.

And I further direct you to preside at the said meeting until a clerk shall be duly chosen and qualified, if no officer is present legally qualified to preside.

Dated at Boston this twenty-fourth day of October, A.D. 1868.

E. S. R., *Justice of the Peace.*

---

Pursuant to the foregoing warrant, I hereby notify the members of the ——— that a meeting of the said corporation will be holden at ——— on Thursday, the fifth day of November next, at seven o'clock in the evening.

A. B.

Boston, Oct. 24, 1868.

SECT. 7. Corporations may make by-laws upon subjects other than those enumerated in this section. *Davis v. Prop's Meeting House in Lowell*, 8 Met. 321, 325.

SECT. 11. Whether an assignee in insolvency is authorized to vote upon stock held by him as such, quære. See *Gray v. Coffin*, 9 Cush. 192, 200, 201, 207.

SECT. 13. The purpose of this section is to enable a pledgee to hold stock without becoming liable for the debts of the corporation, but it was not intended to exclude other methods of conveying stock as collateral security. *Newton v. Fay*, 10 Allen 505, 506.

If the provisions of this section are not complied with, the pledgee will be responsible as a stockholder. *Holyoke Bank v. Burnham*, 11 Cush. 183, 187. — *Johnson v. Somerville Dyeing and Bleaching Co.*, 15 Gray 216, 219.

SECT. 15. Prior to St. 1839, c. 158, it was held that a foreign corporation could not be sued in this state. *Peckham v. North Parish in Haverhill*, 16 Pick. 274, 286.

Under this section the property in this state of a foreign corporation may be attached by trustee process. *Ocean Ins. Co. v. Portsmouth Railway Co.*, 3 Met. 420.

But a foreign corporation, which has no property in this state, cannot be charged as trustee of a party to whom it owes a debt. *Danforth v. Penny*, 3 Met. 564.

As to the proper manner of serving the writ, see *Thayer v. Tyler*, 10 Gray 164.

SECT. 16. As to the personal liabilities of stockholders of *manufacturing* corporations, see St. 1862, c. 218, s. 2.

SECT. 17. As to the remedy against officers, &c., see St. 1862, c. 218, s. 3-5.

For cases relative to the form of remedy under this section, see *Knowlton v. Ackley*, 8 Cush. 192. — *Cochrane v. Reed*, 13 Allen 455.

SECT. 18. See a similar provision in St. 1862, c. 218, s. 6.

As to the liability of other property, held by a trustee on the same trust upon which that on which the liability arises is held, see *Stedman v. Eveleth*, 6 Met. 114, 119.

The estate of an insolvent in the hands of his assignee in insolvency will not be rendered liable under this section. *Gray v. Coffin*, 9 Cush. 192.

SECT. 20-23. Repealed and superseded by St. 1864, c. 201. (Prior to its repeal section 20 was amended, &c., by St. 1861, c. 120. — St. 1862, c. 174. — St. 1863, c. 119. — St. 1863, c. 247.)

Corporations required to make annual returns to assessors of certain stocks and bonds held by them as collateral. St. 1869, c. 444.

SECT. 26. The sale of a franchise under this section will be no bar to proceedings for the forfeiture of the charter of the corporation. *Commonwealth v. Tenth Mass. Turnpike Co.*, 5 Cush. 509.

SECT. 35. This section does not take away the common law right of a corporation to sell its property and close its business. *Treadwell v. Salisbury Manuf. Co.*, 7 Gray 393, 406. But as to the other modes in which a corporation can be dissolved, see *Heard v. Talbot*, 7 Gray 113, 119.

Dissolution refused, when the allegation was that one stockholder owned a majority of the stock and carried on a losing business, contrary to the wishes of the other stockholders. *Pratt v. Jewett*, 9 Gray 34.

It seems that this section does not authorize the court to decree the dissolution of all corporations of whatever character. In *re New South Meeting House* in Boston, 13 Allen 497, 511.

SECT. 37. Receivers of insurance companies appointed under this section to make certain reports to insurance commissioners. St. 1864, c. 308, s. 1.

SECT. 39. This section applies to banks as well as to other corporations. *Stockholders of Cochituate Bank v. Colt*, 1 Gray 382, 387.

SECT. 41. See articles on the subject of the right of the legislature to amend and alter charters of corporations, in the *Am. Law Rev.*, vol. 1, p. 451, and vol 2, p. 25.

As to the extent to which corporations, created prior to March 11, 1831, are subject to be affected by general laws subsequently enacted, see Opinion of Justices in relation to the Provident Institution for Savings in the Town of Boston, 9 Cush. 604.

For cases of amendments and alterations of charters held to be constitutional and valid, see *Roxbury v. Boston & Providence R.R.*, 6 Cush. 424. — *Mass. Gen. Hospital v. State Mut. Life Ins. Co.*, 4 Gray 227, 234. — *Fitchburg R.R. v. Grand Junction R.R. & Depot Co.*, 4 Allen 198, 204. — *Durfee v. Old Col. & Fall River R.R.*, 5 Allen 230. — *Agricultural Branch R.R. v. Winchester*, 11 Allen 29, 32. (In this case it was held that subscriptions to the capital stock would not be affected by such alterations.)

For certain limitations of the power to amend, alter, and repeal, see *Commonwealth v. Essex Co.*, 13 Gray 239, 252. — *Oliver v. Washington Mills*, 11 Allen 268, 282. — *Central Bridge Co. v. Lowell*, 15 Gray 106, 117.

## TITLE XV.

## OF THE INTERNAL POLICE OF THE COMMONWEALTH.

ESTABLISHMENT of a state police. St. 1865, c. 249. — St. 1866, c. 261. — St. 1866, c. 292, s. 2. — St. 1867, c. 177. — St. 1867, c. 349, s. 2. — St. 1868, c. 338.

Acts concerning contagious diseases among cattle. St. 1860, c. 192. — St. 1860, c. 219. — St. 1860, c. 221. — St. 1862, c. 28. — St. 1862, c. 138.

## CHAPTER LXIX.

## OF THE SETTLEMENT OF PAUPERS.

As to the settlement of *Indians*, see St. 1862, c. 184, s. 2.

As to the settlement of persons who have served in the army or navy of the United States, see St. 1865, c. 230. — St. 1866, c. 288.

SECT. 1. *Third Clause.* If the father and mother of illegitimate children intermarry, and the father acknowledges them as his, they are (by virtue of Gen. St. c. 91, s. 4) to be considered legitimate for purposes of settlement. *Monson v. Palmer*, 8 Allen 551.

*Fourth Clause.* “*Being a citizen of this or any other of the United States.*” This qualification struck out by St. 1868, c. 328, s. 1.

A settlement will not be acquired, under this section, by one who lives for three years in a house built by mistake on the land of another adjacent to his own land, and having out-buildings on his own land. *Wellfleet v. Truro*, 9 Allen 137. — s. c. 5 Allen 137.

A husband's tenancy by the curtesy initiate in the separate real estate of his wife is not an estate of inheritance or freehold

within the meaning of this section. *Leverett v. Deerfield*, 6 Allen 481.

It is not necessary that the pauper's deed should be *recorded*, in order that he should gain a settlement. *Belchertown v. Dudley*, 6 Allen 477, 479.

Time within which one is supported as a pauper in a state lunatic hospital, his family in the mean while residing on his land, cannot be included within the three years. *Choate v. Rochester*, 13 Gray 92.

*Fifth Clause.* "*Being a citizen of this or any other of the United States.*" This qualification struck out by St. 1868, c. 328, s. 1.

*Seventh Clause.* For cases arising under this clause, see *Bellingham v. West Boylston*, 4 Cush. 553. — *Leicester v. Fitchburg*, 7 Allen 90.

*Ninth Clause.* Citizenship of this or any other of the United States no longer required. St. 1868, c. 328, s. 1.

*Twelfth Clause.* "*Being a citizen of this or any other of the United States.*" This qualification struck out by St. 1868, c. 328, s. 1.

In order to gain a settlement by residence, it is necessary that a person should reside the requisite time without receiving aid or support from the public. *Worcester v. Auburn*, 4 Allen 574.

The receiving of money from a town by a father, to aid him in supporting his children, will have the same effect in preventing his acquiring a settlement as if the money had been furnished for his own support. *Taunton v. Middleborough*, 12 Met. 35. So if a husband knowingly permits his wife to be supported at a state lunatic hospital at the expense of a town or of the state. *Charlestown v. Groveland*, 15 Gray 15. — *Woodward v. Worcester*, 15 Gray 19. It is otherwise, however, if the wife is so supported without the husband's knowledge, and it does not appear that he was ever called upon to pay for such support, or was unable to pay for it. *Berkeley v. Taunton*, 19 Pick. 480.

But the fact of a person's insanity during a portion of the time will not prevent his acquiring a settlement. *Chicopee v. Whately*, 6 Allen 508.

As to what is proper evidence of domicile and residence in questions of settlement, see *Monson v. Palmer*, 8 Allen 551. — *Chicopee v. Whately*, 6 Allen 508.

As to what degree of absence will break the continuity of residence so as to prevent the acquiring of a settlement, see *Worcester v. Wilbraham*, 13 Gray 586, 589. — *Lee v. Lenox*, 15 Gray 496.

SECT. 3. Even prior to statute it was held that a settlement gained in this state could not be lost by acquiring one in another state. *Wilbraham v. Sturbridge*, 6 Cush. 61.

## CHAPTER LXX.

### OF THE SUPPORT OF PAUPERS BY CITIES AND TOWNS.

Provision concerning pauper insane. St. 1864, c. 288, s. 6.

Provision concerning persons who have served in the army or navy of the United States. St. 1865, c. 230. — St. 1866, c. 288.

"Act to prohibit the removal of minors from the state by overseers of the poor." St. 1868, c. 279. But see St. 1868, c. 328, s. 2.

A person supported by a town as a pauper is not liable to an action by such town for the amount expended, even if he had property when so supported, — except perhaps in case of fraud. *Stow v. Sawyer*, 3 Allen 515.

SECT. 2. As to the authority of overseers of the poor to contract debts for supplies for the support of paupers, see *Ireland v. Newburyport*, 8 Allen 73.

SECT. 4. "*Poor persons.*" These words are not to be confined to paupers who have been a public charge, but in-

clude all poor and indigent persons standing in need of relief. *Hutchings v. Thompson*, 10 Cush. 239.

SECT. 5. The "kindred" who are entitled under this section to recover for support furnished to a pauper, are only those who are such by *consanguinity*. *Farr v. Flood*, 11 Cush. 24.

"*For the relief and support of such pauper.*" "Pauper" is here used in the same sense as "poor person" in the preceding section. *Hutchings v. Thompson*, 10 Cush. 239. See also *Shearer v. Shelburne*, 10 Cush. 3, 5.

In order to render one's kindred liable to a city, &c., for support afforded him, he must at the time have stood in need of relief as a pauper. *New Bedford v. Chase*, 5 Gray 28.

SECT. 11. "*May award costs.*" From the decision of the court in this matter there is no appeal. *South Reading v. Hutchinson*, 10 Allen 68.

SECT. 12. A town may recover under this section, although the person to whom the relief was furnished was entitled to support from the trustees under his father's will. *Groveland v. Medford*, 1 Allen 23.

"*After the cause of action arises.*" This is when the payment is made, not when the notice is given. *Amherst v. Shelburne*, 11 Gray 107.

SECT. 15. \$10 to be paid for the funeral expenses of each pauper over twelve, and \$5 for those of each under that age. St. 1867, c. 97.

SECT. 16. "*Necessarily incurred.*" See *Lamson v. Newburyport*, 14 Allen 30.

"*Relief of a pauper therein.*" As to the force and intent of the word "therein," see *Hawes v. Hanson*, 9 Allen 134.

As to the kind of *notice* required by this section, see *Walker v. Southbridge*, 4 Cush. 199. — *Williams v. Braintree*, 6 Cush. 399.

A town will not be liable under this section, unless the pauper was in need of immediate relief at the time when it was afforded. *Shearer v. Shelburne*, 10 Cush. 3.

SECT. 17. "*A written notification.*" As to the form of such notification, see *Lynn v. Newburyport*, 5 Allen 545.

SECT. 18. As to what might amount to a waiver of the want of a proper answer, see *Petersham v. Coleraine*, 9 Allen 91, 93.

SECT. 23. For the records and returns now required of overseers of the poor, see St. 1867, c. 209. (Prior acts on this subject, now repealed. St. 1862, c. 112, s. 1, 2, 3. — St. 1864, c. 307, s. 6, 7.)

## CHAPTER LXXI.

### OF ALIEN PASSENGERS AND STATE PAUPERS.

Process under this chapter may be served by the state constable or his deputies. St. 1866, c. 292, s. 2.

#### *Board of Alien Commissioners.*

Board of alien commissioners abolished, and the board of state charities substituted in its place. St. 1863, c. 240. — St. 1869, c. 453.

SECT. 4. This section "made applicable to any corporation or party by whose means any person not having a settlement in this commonwealth is brought into the state." St. 1866, c. 272, s. 1.

SECT. 9. Certain facts to be included in annual report. St. 1860, c. 83, s. 1.

#### *Alien Passengers.*

Office of superintendent of alien passengers in the city of Boston abolished, and his duties transferred to the general agent of state charities. St. 1863, c. 240, s. 6. Such officer to have supervision of vessels bringing passengers to any port in this state, &c., &c. St. 1869, c. 251.

SECT. 12. The officers authorized by this section, to be appointed and commissioned by the general agent of state charities, and to be deemed his deputies, &c. Power and duties of such deputies. St. 1869, c. 251.



SECT. 12, 14. Provisions of these sections to "apply to all vessels arriving at any port of this commonwealth from any port or place without the limits of the United States, or which shall have stopped at any such port or place during their voyages." St. 1866, c. 292, s. 1.

SECT. 16-18. Repealed by St. 1865, c. 160.

SECT. 25. Provisions of this section made "applicable to any corporation or party by whose means any person not having a settlement in this commonwealth is brought into the state." St. 1866, c. 272, s. 1.

Corporations bringing in foreigners to labor, to give bond for their support. St. 1866, c. 272, s. 2.

*The Hospital at Rainsford's Island.*

SECT. 26. Office of inspector of hospital at Rainsford's Island abolished. Duties to be performed under direction of board of state charities by such officer or officers as they may designate. St. 1869, c. 43.

(Term of office and appointment of inspectors previously altered by St. 1861, c. 195.)

SECT. 29. Certain soldiers with infectious diseases may be admitted. St. 1864, c. 170.

*State Almshouses and State Paupers.*

Establishment of state workhouse. St. 1866, c. 198.— St. 1869, c. 258.

Receptacle for insane criminals to be provided at Tewksbury almshouse. St. 1864, c. 288, s. 10.

SECT. 32. Salary of inspector altered to \$150 per annum without travelling expenses. St. 1862, c. 212.

SECT. 36. Provisions for sending certain Indians to state almshouses. St. 1863, c. 159.

Persons infected with smallpox or other dangerous diseases, or whose health would be endangered by removal, not to be sent. How such persons shall be supported. St. 1865, c. 162.

SECT. 40, 41. Repealed by St. 1864, c. 169, s. 1.

SECT. 42. The words "as aforesaid," and "according to the provisions of section forty," struck out, and the words "and the expense of such care and treatment of any discharged convict shall be paid by the city or town where he may have a legal settlement, or if he is a state pauper, by the Commonwealth," added by St. 1864, c. 169, s. 2.

SECT. 43. This section amended by St. 1866, c. 234, s. 1, 2. (See also St. 1861, c. 94, s. 1, repealed by St. 1866, c. 234, s. 3.)

SECT. 47. Inspectors of state almshouses when binding out minors as apprentices shall insert certain provisions in the indentures of apprenticeship. St. 1869, c. 302.

SECT. 49. "*If a pauper having a legal settlement,*" &c. Certain persons who have served in the army or navy of the United States to be deemed such. St. 1865, c. 230. — St. 1866, c. 288.

For an explanation of the intent of this section, see *Commonwealth v. Dracut*, 8 Gray 455, 457.

SECT. 52. Provision for removal, by overseers of the poor, of paupers, having settlement in this state, to place without this state, in which they have subsequently acquired one. St. 1868, c. 328, s. 2.

Certain state paupers may be removed by board of state charities out of the state to a place where they have a legal settlement or friends willing to support them. St. 1860, c. 83. — St. 1863, c. 240.

## CHAPTER LXXII.

### OF THE MAINTENANCE OF BASTARD CHILDREN.

Process under this chapter may be served by the state constable or his deputies. St. 1866, c. 292, s. 2.

This chapter is not applicable in cases where the child was begotten and born in another state and neither mother nor

child ever had a residence in this state. *Grant v. Barry*, 9 Allen 459. But the mere fact that the child was *begotten* out of the state, its parents then residing out of the state, will not prevent its application, if the child is born here, both its parents residing here at the time of birth. *McFadden v. Frye*, 13 Allen 472.

In proceedings under this chapter the facts need not be proved, according to the rule in criminal cases, beyond the possibility of a doubt, but only by a preponderance of evidence. *Richardson v. Burleigh*, 3 Allen 479, 481.

No statute of limitations applies to complaints under this chapter. *Wheelwright v. Greer*, 10 Allen 389, 391.

A complaint under this chapter may be commenced after the death of the bastard. *Meredith v. Wall*, 14 Allen 155.

SECT. 1. It is not necessary that the husband of the mother of a bastard should join with her in the complaint. *Sullivan v. Kelly*, 3 Allen 148.

As to the county in which a complaint should be brought, see *Garlick v. Bartlett*, 4 Allen 365. — *Williams v. Campbell*, 3 Met. 209. — *Gallary v. Holland*, 15 Gray 50.

It is not necessary that the original complaint should be in writing. *Smith v. Hayden*, 6 Cush. 111.

The complainant's "*accusation and examination*" need not be committed to writing by the magistrate or in his presence. *Sayles v. Fanning*, 13 Gray 538. Nor is it essential that it should be signed by the complainant. *Williams v. Copeland*, 5 Allen 209. As to the proper form of such "*accusation and examination*," see further *Gallary v. Holland*, 15 Gray 50.

As to the proper mode of receiving and certifying to the complaint in a police court, see *Richardson v. Burleigh*, 3 Allen 479.

As to the importance of a correct allegation in the complaint of the time when and place where the child was begotten, see *Bassett v. Abbott*, 4 Gray 69.

SECT. 2. "*Either of said persons may prosecute.*" The

persons here referred to include those authorized by the officers previously mentioned, as well as those officers themselves. *Callinan v. Coffey*, 3 Allen 477.

Leave of court should be obtained before a complaint is prosecuted under this section. *Noonan v. Brogan*, 3 Allen 481, 483.

This section does not authorize the bringing of a new complaint, but the prosecution of the existing one. *Wheelwright v. Greer*, 10 Allen 389. As to the mode of proceeding, see *Jones v. Thompson*, 8 Allen 334.

SECT. 4. When the accused fails to give bond, notice to be given to complainant. St. 1863, c. 127, s. 4.

Provision for discharge of accused when he has been committed, but the complaint has not been entered. St. 1865, c. 161.

As to what the defendant must do in order to discharge the bond in case he is found guilty, see *Power v. Fenno*, 10 Gray 249. — *Towns v. Hale*, 2 Gray 199.

For cases in which it has been held that there has been a breach of the bond, see *Hyde v. Chapin*, 11 Cush. 197. — *Hodge v. Hodgdon*, 8 Cush. 294.

SECT. 5. Further provision for the continuance of bastardy complaints. St. 1863, c. 127.

As to the proper course for the court when sureties object to being longer held liable, see *McHugh*, Petitioner, 3 Cush. 452.

The sureties have no right to surrender their principal to the jailer or anywhere except to the court. *Doherty v. Clark*, 3 Allen 151, 152.

The sureties cannot exonerate themselves by surrendering their principal during the pendency of an action against them. *Locke v. Johnson*, 3 Allen 153.

SECT. 8. This section in its present shape appears to have been an attempt to state the effect of earlier statutes as determined by decisions of the supreme court. See *Savage v. Beardon*, 11 Gray 376. — *Murphy v. Spence*, 9 Gray 399.

As to the facts which may properly be shown in corroboration of the mother's evidence, see *Hawes v. Gastin*, 2 Allen 402. — *Eddy v. Gray*, 4 Allen 435.

SECT. 9. "*Unless provision is made.*" This cannot be done by a note given to the prosecuting officer, and a note so given will be void. *Wheelwright v. Sylvester*, 4 Allen 59. But when the compromise is made with the consent of the mother or her parent or guardian, it is now provided by statute that either a fixed sum or *security for the payment* thereof may be taken. St. 1862, c. 213.

SECT. 11. As to the necessary preliminaries to the taking of the oath, see *Doherty v. Clark*, 3 Allen 151.

SECT. 13. In *police courts* trials may be had under this chapter when they are sitting either for criminal or civil business. St. 1863, c. 127, s. 5.

## CHAPTER LXXIII.

### OF THE STATE LUNATIC HOSPITALS.

Supreme court may appoint commissioners to inquire into the insanity of any person confined therefor. St. 1864, c. 288, s. 1-5.

Private lunatic asylums to be licensed. St. 1864, c. 288, s. 8.

Additional acts relative to the insane. St. 1862, c. 223. — St. 1864, c. 288. — St. 1865, c. 268.

SECT. 1. Titles of state lunatic hospitals. St. 1862, c. 223, s. 1.

SECT. 3. Trustees and treasurers of state lunatic hospitals may consult with the attorney-general and the district-attorneys. St. 1862, c. 223, s. 12.

SECT. 4. (Officers of state lunatic hospitals not to hold any other office. St. 1862, c. 288, s. 13. Repealed by St. 1867, c. 168.)

SECT. 8-11. Repealed and superseded by St. 1862, c. 223, s. 3-6, 8, 18. — St. 1865, c. 268, s. 12. — St. 1867, c. 355, s. 1.

SECT. 16. See St. 1862, c. 223, s. 7.

SECT. 18. See St. 1862, c. 223, s. 7.

SECT. 19-24. Repealed and superseded by St. 1862, c. 223, s. 9-11, 18.

SECT. 25. "*Lunatic committed to either hospital.*" As to the meaning of the word "committed," see *Cumington v. Wareham*, 9 Cush. 585.

"*Like rights and remedies.*" See *Worcester v. Milford*, 18 Pick. 379. — *Andover v. Easthampton*, 5 Gray 390. — *Amherst v. Shelburne*, 11 Gray 107.

"*Any kindred obligated by law,*" &c. The husband of a lunatic is not included among the "kindred," — he is however liable at common law for the expenses of the support of his lunatic wife. *Brookfield v. Allen*, 6 Allen 585.

As to the expenses which may be recovered under this section, see *Cumington v. Wareham*, 9 Cush. 585.

SECT. 27. Repealed and superseded by St. 1862, c. 223, s. 13, 18.

SECT. 28. Repealed by St. 1862, c. 223, s. 18.

SECT. 29. Similar authority to discharge lunatics given to judges of probate courts. St. 1862, c. 223, s. 15.

SECT. 30. Repealed and superseded by St. 1862, c. 223, s. 14, 18.

SECT. 32. Cost of clothing and money furnished under this section and of burial of pauper lunatic, how paid. St. 1862, c. 223, s. 16.

## CHAPTER LXXIV.

### OF COUNTY RECEPTACLES FOR INSANE PERSONS.

SECT. 2. (Further provisions on the subject of this section. St. 1862, c. 165. Repealed by St. 1866, c. 224.)

## CHAPTER LXXV.

## OF THE STATE INDUSTRIAL SCHOOL FOR GIRLS.

SECT. 1. Advisory board to the trustees of the state industrial school, consisting of three women, to be appointed. St. 1868, c. 153.

SECT. 6. As to the mode of issuing warrants, &c., under this section, see St. 1861, c. 200.

Warrants to be returned to clerks of superior courts. St. 1861, c. 116.

Whenever application is made for the commitment of any child to any reformatory maintained by the state, the visiting agent of the board of state charities to be notified, &c., &c. St. 1869, c. 453, s. 4, 6.

SECT. 7. Warrant may be directed to and served by any officer qualified to serve civil or criminal process. St. 1862, c. 9.

SECT. 6, 9, 10. Certain records of commitments under these sections to be made. St. 1863, c. 199.

SECT. 11. As to allowance of fees, see St. 1861, c. 116.

SECT. 12. Commitments to be "until the age of *twenty-one* years or until otherwise discharged." St. 1864, c. 290, s. 1.

Girls committed prior to above statute may in certain cases be kept till they are twenty-one years of age. St. 1863, c. 184, s. 1. — St. 1864, c. 290, s. 2.

SECT. 14. Trustees to be guardians to girls without parents or guardians, and who are discharged under twenty-one years of age. St. 1863, c. 184, s. 2.

SECT. 15. Certain provisions to be inserted in indenture of apprenticeship. St. 1869, c. 302. See also St. 1869, c. 453, s. 3, 6.

SECT. 24. Repealed and superseded by St. 1865, c. 256.

## CHAPTER LXXVI.

## OF THE STATE REFORM SCHOOL FOR BOYS.

Provisions of acts relating to the state reform school for boys, including the nautical branch thereof, to extend to boys committed by the courts or magistrates of the United States. St. 1866, c. 274.

*State Reform School at Westborough.*

SECT. 6. Certain provisions to be inserted in indenture of apprenticeship. St. 1869, c. 302. See also St. 1869, c. 453, s. 3.

*Nautical Branch of the State Reform School.*

SECT. 12. Number of trustees increased to seven. St. 1865, c. 224, s. 1, 5.

The corporation called the trustees of the nautical branch of the state reform school to be called the "Massachusetts nautical school." St. 1867, c. 260.

SECT. 13. Repealed and superseded by St. 1865, c. 224.

*Commitments.*

Record of commitments under sections 17, 21, and 22 to be made and filed in the superior court. St. 1863, c. 199.

Whenever application is made for the commitment of any child to any reformatory maintained by the state, the visiting agent of the board of state charities to be notified, &c., &c. St. 1869, c. 453, s. 4.

SECT. 17. "*Under the age of sixteen years.*" Altered to "between the ages of seven and eighteen years." St. 1864, c. 202, s. 1. (Previously altered to "between the ages of eleven and eighteen years" by St. 1863, c. 139, s. 1.)

Summons or notice required by this section may be dispensed with or waived. St. 1863, c. 139, s. 3. The summons, except so far as dispensed with by this statute, is necessary to the



validity of the proceedings. *Fitzgerald v. Commonwealth*, 5 Allen 509.

SECT. 18. As to the mode of proceeding, issuing warrant, &c., by the judge, see St. 1861, c. 200.

No boy to be committed to state reform school, unless between ages of seven and fourteen, nor to nautical branch, unless between ages of twelve and eighteen. St. 1864, c. 202, s. 2. (Prior provision fixing ages at eleven and fourteen, and fourteen and eighteen, respectively. St. 1863, c. 139, s. 2.)

Warrant may be directed to any officer qualified to serve civil or criminal process in the county. St. 1862, c. 9.

*"A boy under the age of sixteen years."* It seems that this should now read "between the ages of seven and eighteen years." St. 1864, c. 202, s. 1.

SECT. 20. Warrant may be served by any officer qualified to serve civil or criminal process in the county. St. 1862, c. 9.

SECT. 21. *"Under sixteen years of age."* Altered to "between the ages of seven and eighteen" by St. 1864, c. 202, s. 1. (St. 1863, c. 139, s. 1.)

So much of this section as requires notice of the proceedings to be given, repealed by St. 1863, c. 139, s. 3.

SECT. 26. *"Under the age of sixteen years."* Altered to "between the ages of seven and eighteen years" by St. 1864, c. 202, s. 1. (St. 1863, c. 139, s. 1.)

*"If below the age of fourteen years," &c.* New provision on this point. St. 1864, c. 202, s. 2. — (St. 1863, c. 139, s. 2.)

## CHAPTER LXXVII.

### OF THE LAW OF THE ROAD.

SECT. 1. *"When persons meet each other."* Parties do not "meet" within the meaning of this section, when one is travelling along a street and another is turning into that street from a cross-road intersecting it. In such cases the rule of the

common law applies, and each is to use due and reasonable care adapted to the circumstances and place. *Lovejoy v. Dolan*, 10 Cush. 495, 496. — *Garrigan v. Berry*, 12 Allen 84.

*"On a bridge or road."* This section applies as well to *private* as to *public* roads. *Commonwealth v. Gammons*, 23 Pick. 201.

*"To the right of the middle of the travelled part."* By the "travelled part" of the road is intended that part which is wrought for travelling, and not any track which may happen to be made in the road by the passing of vehicles. *Clark v. Commonwealth*, 4 Pick. 125. — *Jaquith v. Richardson*, 8 Met. 213, 216. But see *contra*, *Commonwealth v. Allen*, 11 Met. 403, 405. When however the road is hidden by snow, the beaten and travelled path is intended. *Jaquith v. Richardson*, 8 Met. 213.

SECT. 3. As to the form of a complaint under this section, see *Commonwealth v. Allen*, 11 Met. 403.

A master is not liable under this section for an injury caused by the act of his servant in driving on the wrong side of the road. The statute confines both the civil remedy and the public prosecution to the particular individual who is personally guilty. *Goodhue v. Dix*, 2 Gray 181, 182.

A party who, when driving on the wrong side of the road, comes in collision with another, will not be liable for the damages caused by the collision, if such other party might by the use of ordinary care have avoided the collision. *Parker v. Adams*, 12 Met. 415. But see *contra*, *Fales v. Dearborn*, 1 Pick. 345. So of a party driving a sleigh without bells. *Counter v. Couch*, 8 Allen 436.

And a party driving on the wrong side of the road may even recover damages from one who carelessly and recklessly drives against him, provided his own fault does not contribute to the accident. *Spofford v. Harlow*, 3 Allen 176. — *Smith v. Gardner*, 11 Gray 418.

Nor will a party driving a sleigh without bells be prevented

from recovering from a town for an injury caused by a defect in the way, unless the want of bells contributed to cause the accident. *Kidder v. Dunstable*, 11 Gray 342, 344.

## CHAPTER LXXVIII.

### OF TIMBER AFLOAT OR CAST ON SHORE.

## CHAPTER LXXIX.

### OF LOST GOODS AND STRAY BEASTS.

## CHAPTER LXXX.

### OF UNCLAIMED PROPERTY TRANSPORTED BY COMMON CARRIERS.

Provision for the sale of merchandise, by any railroad company or by any steam or sailing vessel, for the charges of transportation. St. 1866, c. 152.

Provision for sale of unclaimed property by express companies and persons engaged in the express business. St. 1864, c. 139.

## CHAPTER LXXXI.

### OF WRECKS AND SHIPWRECKED GOODS.

## CHAPTER LXXXII.

### OF THE PRESERVATION OF CERTAIN BIRDS AND ANIMALS.

This chapter, together with all other general laws on the same subject, repealed and superseded by "an act to aid in the preservation of birds, birds' eggs, and deer." St. 1869, c. 246. (The other general laws repealed by this statute are St. 1865, c. 46. — St. 1865, c. 158. — St. 1867, c. 125. — St. 1867, c. 257. — St. 1868, c. 126. — St. 1868, c. 158. — St. 1868, c. 161.)

## CHAPTER LXXXIII.

## OF FISHERIES, KELP, AND SEA-WEED.

*Fisheries.*

“An act for encouraging the cultivation of useful fishes.”  
St. 1869, c. 384. This act provides, among other things for a board of “commissioners on inland fisheries.”

Acts for appointment of commissioners of fisheries, and concerning obstructions to the passage of fish in the Connecticut and Merrimac and other rivers. St. 1866, c. 238. — St. 1867, c. 344. — St. 1867, c. 289, s. 3. — St. 1868, c. 179, s. 2. — St. 1869, c. 384, s. 2-6, 9, 10. — St. 1869, c. 422.

Acts to regulate fishing in the Connecticut river. St. 1869, c. 76. — St. 1864, c. 62. — (St. 1868, c. 130, repealed.)

Act for the protection of trout in *Avery Brook*, in the towns of Charlemont and Heath. St. 1869, c. 235.

Act for protection of trout in *East Head Stream*, in Carver and Plymouth. St. 1867, c. 86.

Act for protection of trout in *Grist Mill Pond*, in Wareham. St. 1868, c. 110.

Act for restocking of *Ipswich River* and its tributaries with fish. St. 1868, c. 157.

Act to protect trout in *Jones' Mill Creek*, in Barnstable. St. 1868, c. 290.

Act to prohibit seining near the outlet of *Lagoon Pond*, in Dukes County. St. 1862, c. 47.

Act for protection of fish in *Little Quitticus Pond*, in Lakeville and Rochester. St. 1862, c. 202.

Act for protection of trout in *Maple Spring Pond*, in Wareham. St. 1862, c. 58.

Act to restrict the seining of fish in the harbor of *Marion*. St. 1864, c. 273.

Act to protect the fishery in *Marshpee River*. St. 1860, c. 46.

Act to regulate seining in harbor of the *Mattapoissett*. St. 1864, c. 259.

Act for protection of trout in *Merrill Pond*, in Wendell. St. 1868, c. 289.

Act to regulate the fishing in *Merrimack River*. St. 1867, c. 289.

Act for protection of alewives and other fish in *Mystic River*. St. 1865, c. 219. Acts for restocking the same and its tributaries with fish. St. 1867, c. 149. — St. 1868, c. 128.

Act for protection of trout in *Nye's Pond*, in Sandwich. St. 1862, c. 94.

Act to protect trout fishery in *Quashnet River*, in Marshpee. St. 1864, c. 150.

Act to regulate the oyster fisheries and the seining of fish in Cole's River and Lee's River in *Swansea*. St. 1869, c. 172.

Act in relation to fisheries in town of *Winchester*. St. 1864, c. 234.

Cities and towns may establish herring and alewife fisheries. St. 1866, c. 187.

Establishment of herring fishery in Eel River and Town Brook, in Plymouth. St. 1865, c. 58.

SECT. 2. Provisions of this section relative to *pickerel*, repealed by St. 1869, c. 384, s. 34.

As to the taking of *trout*, see St. 1869, c. 384, s. 26, 28. (Prior laws repealed or superseded. St. 1862, c. 161. — St. 1866, c. 249, s. 1, 3. See St. 1869, c. 384, s. 34.)

(For laws relative to the taking of *black bass* and *smelts*, now repealed and superseded by St. 1869, c. 384, see St. 1862, c. 59. — St. 1866, c. 249, s. 2, 3 — St. 1868, c. 179. — St. 1869, c. 64 — St. 1869, c. 75.)

#### *Oysters and other Shell Fish.*

Act to regulate the oyster fishery in the town of Somerset. St. 1864, c. 44.

Act to protect the oyster fishery in Monument River, in Sandwich. St. 1867, c. 237.

As to the power of the legislature to regulate the taking of shell fish, see *Commonwealth v. Bailey*, 13 Allen 541.

SECT. 12. The right to give permits to take oysters belongs to the selectmen of a town, and cannot be exercised by the town itself in its corporate capacity. *Dill v. Wareham*, 7 Met. 438, 446, 447.

SECT. 15. Amended by inserting the words "an inhabitant of this state" after the word "fisherman" in the third line. St. 1867, c. 70.

It is a breach of the provisions of this section if two fishermen, *belonging to the same vessel*, take jointly more than seven bushels of clams at one time. *Commonwealth v. Bailey*, 13 Allen 541, 545.

SECT. 19. Provisions of this section and section 13 "extended to the north shore of the town of Barnstable and the shores of Barnstable harbor." St. 1867, c. 258.

*Kelp and Sea-weed.*

Act concerning the taking of kelp and sea-weed upon lands of the Herring Pond Plantation. St. 1867, c. 96.

SECT. 20. As to the meaning of "adrift" in this section, see *Anthony v. Gifford*, 2 Allen 549.

## CHAPTER LXXXIV.

### OF THE OBSERVANCE OF THE LORD'S DAY.

Penalty for discharging fire-arms or fishing on the Lord's day. St. 1865, c. 258.

SECT. 1. This section made applicable "to any person who is present at any *game* on the Lord's day." St. 1862, c. 152.

Offences named in this section to be "punished each by a fine not exceeding *fifty dollars*." St. 1863, c. 143.

"*Whoever keeps open*," &c. As to what is meant by "keeps open," see *Commonwealth v. Lynch*, 8 Gray 384. — *Commonwealth v. Harrison*, 11 Gray 308.

"*Any manner of labor, business, or work.*" The execution of a will is not such. *Bennett v. Brooks*, 9 Allen 118.

"*Works of necessity.*" The carrying of the mails has been held to be such. *Commonwealth v. Knox*, 6 Mass. 76. So the repair of a defect in the highway. *Flagg v. Millbury*, 4 Cush. 243. But as to the receiving of criminal complaints and the issuing of warrants on the Lord's day, see *Pearce v. Atwood*, 13 Mass. 324, 345. See also cases cited under section 2.

The gathering of sea-weed on a beach on the Lord's day is not a work of necessity, although, unless then gathered, it will probably be floated away beyond reach. *Commonwealth v. Sampson*, 97 Mass. 407.

The hoeing on the Lord's day of crops, which are suffering from the want of hoeing, is not a work of necessity. *Commonwealth v. Josselyn*, 97 Mass. 411.

A contract made on the Lord's day in violation of this section is *absolutely void*, and no subsequent ratification will make it possible to maintain an action upon it. *Day v. McAllister*, 15 Gray 433.

Upon a bond executed on the Lord's day in violation of this section no action can be maintained. *Pattee v. Greely*, 13 Met. 284. So of a guaranty so executed, although it did not take effect as a contract until a later date. *Merriam v. Stearns*, 10 Cush. 257. Nor can an action be maintained for a deceit practised in the exchange of horses on the Lord's day. *Robeson v. French*, 12 Met. 24. But money paid on the Lord's day, and retained afterwards; discharges a debt. *Johnson v. Willis*, 7 Gray 164.

The fact that the request for services afterwards rendered on a week day, was made on the Lord's day, if it does not appear that the request was accepted on that day, will not prevent the party rendering the service from maintaining an action upon the promise implied in such request. *Dickinson v. Richmond*, 97 Mass. 45.

A note made and delivered on a week day will not be void

because dated, and by agreement to take effect, on a subsequent Lord's day. *Stacy v. Kemp*, 97 Mass. 166.

Where a horse was sold and delivered on the Lord's day, it was held that, although the purchaser kept him afterwards, the owner could not maintain an action of contract against him for the price of the horse, but that his only remedy was by an action of tort in the nature of trover; it seems however that, if the purchaser had sold the horse, the owner might have brought an action of contract for the proceeds. *Ladd v. Rogers*, 11 Allen 209, 212. When however pigs were sold on Sunday and *delivered and accepted on Monday*, it was held that the owner might recover their value from the purchaser in an action of contract upon an implied assumpsit. *Bradley v. Rea*, 14 Allen 20.

As to the form of complaint or indictment for offences under this section, see *Commonwealth v. Collins*, 2 Cush. 556. — *Commonwealth v. Wright*, 12 Allen 187. — *Commonwealth v. Trickey*, 13 Allen 559. — *Commonwealth v. Sampson*, 97 Mass. 407. — *Commonwealth v. Josselyn*, 97 Mass. 411.

SECT. 2. "*Whoever travels*," &c. As to what constitutes travelling, see *Hamilton v. Boston*, 14 Allen 475, 484, in which case it was held that one who takes a short walk for exercise does not "travel" within the meaning of this section. In this case Judge Gray gives a historical sketch of all the early laws upon the subject of travelling on the Lord's day.

As to what are sufficient reasons for travelling on the Lord's day, see *Pearce v. Atwood*, 13 Mass. 324, 350. — *Stanton v. Metropolitan R.R. Co.*, 14 Allen 485, 486. — *Jones v. Andover*, 10 Allen 18. — *Commonwealth v. Knox*, 6 Mass. 76. See also cases cited under preceding section.

A person travelling on the Lord's day cannot recover of a town for injuries received by him from a defect in the highway, unless his travelling was from necessity or charity, and the burden is upon him to show that it was so. *Bosworth v. Swansey*, 10 Met. 363. In an action to recover for such in-



juries the defendant may prove the plaintiff's violation of the statute as a defence, without having specially averred it in the answer. *Jones v. Andover*, 10 Allen 18.

Nor can one maintain an action against a street railway company for a personal injury received by him, in consequence of their negligence, while travelling in one of their cars upon the Lord's day contrary to this section. *Stanton v. Metropolitan R.R. Co.*, 14 Allen 485.

The owner of a horse, who lets it to be driven in violation of this section, cannot recover for injuries caused to the horse by the immoderate driving of the hirer, even although such injuries are occasioned in going to a different place from that to which the horse was hired to go. *Gregg v. Wyman*, 4 Cush. 322.

One who travels illegally on the Lord's day, and stops at a hotel, and delivers his property for keeping into the charge of the landlord's servant, may recover of the landlord the value of such property, if it is not to be found on the following day. *Cox v. Cook*, 14 Allen 165, 166.

SECT. 3. Repealed and superseded by St. 1864, c. 79.

SECT. 9. This is matter of defence, to be alleged and proved by the defendant. *Commonwealth v. Trickey*, 13 Allen 559.

## CHAPTER LXXXV.

### OF GAMING.

"Act to prevent gaming in public conveyances." St. 1869, c. 382.

SECT. 1. *Dog-fighting* is a "game" within the meaning of this section. *Grace v. McElroy*, 1 Allen 563.

If the loser does not commence his action under this section within three months, his right of action is lost. *Shed v. Tilston*, 8 Gray 243.

SECT. 2. Throwing dice to determine who shall pay for liquor, or for any other article bought, is "gaming" within

the meaning of this section. *Commonwealth v. Gourdier*, 14 Gray 390.

SECT. 8. "Persons who are found *present* at any game or sport played for money or other thing of value at a common gaming-house" "may be arrested and punished in like manner as persons there found playing." St. 1869, c. 364, s. 1.

SECT. 9. See additional provision in St. 1861, c. 127, s. 2.

## CHAPTER LXXXVI.

### OF THE MANUFACTURE, SALE, ETC., OF INTOXICATING LIQUORS.

This chapter, having been amended by St. 1861, c. 136, and St. 1865, c. 223, was repealed and a license law was substituted by St. 1868, c. 141. That act, having been amended by St. 1868, c. 311. — St. 1868, c. 318. — St. 1868, c. 342. — St. 1868, c. 344, and St. 1869, c. 191, was in its turn repealed, and the provisions of this chapter substantially re-enacted, by St. 1869, c. 415. See also St. 1869, c. 442.

## CHAPTER LXXXVII.

### OF THE SUPPRESSION OF COMMON NUISANCES.

As to the right of an individual to abate a common nuisance, see *Brown v. Perkins*, 12 Gray 89.

SECT. 6, 7. Jurisdiction of offences under these sections given to police courts, but punishment limited. St. 1863, c. 78. — St. 1865, c. 289, s. 2. — St. 1865, c. 281. — St. 1866, c. 280, s. 3, 4.

SECT. 6. "*Resorted to*." As to the meaning of these words, see *Commonwealth v. Lambert*, 12 Allen 177. — *Commonwealth v. Stahl*, 7 Allen 304.

"*Lewdness*." As to the meaning of this word, see *Commonwealth v. Lambert*, 12 Allen 177.

*"Illegal gaming."* This includes playing any game of hazard to determine who shall pay for liquor. *Commonwealth v. Taylor*, 14 Gray 26. — *Commonwealth v. Gourdier*, 14 Gray 390.

SECT. 7, 8, 9. Cases under these sections not to be disposed of except by trial, unless on affidavit for good cause, &c. St. 1865, c. 223.

SECT. 7. Persons convicted of any offence set forth in this chapter to be punished by fine of not less than \$50 nor more than \$100, and imprisoned in house of correction not less than three nor more than twelve months, except, &c. St. 1866, c. 280, s. 1, 3. (See also St. 1865, c. 269, s. 1.)

See the following cases arising under this section. *Commonwealth v. Kimball*, 7 Gray 328. — *Commonwealth v. Keefe*, 9 Gray 290. — *Commonwealth v. Dunbar*, 9 Gray 298. — *Commonwealth v. Buxton*, 10 Gray 9. — *Commonwealth v. Skelley*, 10 Gray 464. — *Commonwealth v. Hart*, 10 Gray 465. — *Commonwealth v. Davis*, 11 Gray 48. — *Commonwealth v. Godley*, 11 Gray 454. — *Commonwealth v. McArty*, 11 Gray 456. — *Commonwealth v. Kelley*, 12 Gray 175. — *Commonwealth v. Farrand*, 12 Gray 177. — *Commonwealth v. Quinn*, 12 Gray 178. — *Commonwealth v. Howe*, 13 Gray 26. — *Commonwealth v. Shattuck*, 14 Gray 23. — *Commonwealth v. Shea*, 14 Gray 386. — *Commonwealth v. Gourdier*, 14 Gray 390. — *Commonwealth v. Welsh*, 1 Allen 1. — *Commonwealth v. Gallagher*, 1 Allen 592. — *Commonwealth v. Carolin*, 2 Allen 169. — *Commonwealth v. Hill*, 4 Allen 589.

SECT. 8. *"Shall annul and make void the lease."* It seems that it will have this effect only at the election of the lessor. *Trask v. Wheeler*, 7 Allen 109, 111. — *Way v. Reed*, 6 Allen 364, 370.

If an under-tenant of a lessee, without his knowledge, uses the leased premises for any of the illegal purposes specified, such use will not annul the original lease. *O'Connell v. M'Grath*, 14 Allen 289. — *Healy v. Trant*, 15 Gray 312.

By *"the owner"* in this section is meant not the person

owning the fee of the estate, but the one owning the title, though only leasehold, under which the tenant making the unlawful use of the estate holds. *Healy v. Trant*, 15 Gray 312, 313.

SECT. 9. Punishment altered by St. 1866, c. 280, s. 3.

As to the form of an indictment under this section, see *Commonwealth v. Moore*, 11 Cush. 600.

## CHAPTER LXXXVIII.

### OF LICENSES AND MUNICIPAL REGULATIONS OF POLICE.

Insurance brokers to obtain authority to act as such from the insurance commissioners. St. 1869, c. 93.

Private lunatic asylums to be licensed. St. 1864, c. 288, s. 8, 9.

Carriers of passengers, freight, or baggage to or from Martha's Vineyard camp meeting to be licensed. St. 1864, c. 231.

"Act for the regulation of tenement and lodging houses in the city of Boston." St. 1868, c. 281.

"Act concerning the attaching or mooring of rafts to any bridge, pier, or wharf, in the harbor of Boston." St. 1862, c. 73.

Discrimination on account of color not to be allowed in any licensed inn, public place of amusement, public conveyance, or public meeting. St. 1865, c. 277.

Exclusion of persons from, or their restriction in, any licensed theatre or public place of amusement, or in any public conveyance or public meeting or licensed inn, without good cause, forbidden. St. 1866, c. 252.

Act authorizing regulations in relation to the *passage of carriages*, &c., through streets, &c., of cities and towns, and in relation to *itinerant musicians* in streets and public places of cities. St. 1869, c. 301.

It seems that licenses under this chapter do not create any contract between the government and the party licensed, but

are subject to be modified or repealed at any time. *Calder v. Kurby*, 5 Gray 597, 598.

*Junk, Old Metals, and Second-hand Articles.*

Towns may make regulations for dealers in junk, &c. St. 1862, c. 205.

SECT. 26. See St. 1862, c. 205, s. 2.

*Stables.*

For special provisions relative to the erection, occupation, or use of stables in the city of Boston, see St. 1869, c. 369, also St. 1860, c. 109, and St. 1810, c. 124, printed with it.

SECT. 31. One who keeps a stable in violation of this section cannot recover damages for an *injury to his business* caused by the escape of gas into the water of a well on his premises, but may recover for the nuisance so caused to his real estate. *Sherman v. Fall River Iron Works Co.*, 5 Allen 213.

*Steam Engines, Furnaces, and Boilers.*

SECT. 33. Stationary engines not to be erected within five hundred feet of any dwelling-house or public building. St. 1862, c. 74.

For an explanation of this section, see *Call v. Allen*, 1 Allen 137.

SECT. 40. See St. 1862, c. 74, s. 2.

*Rockets, Gunpowder, and other Explosive Substances.*

“Act to regulate the transportation of gunpowder within and through the city of Cambridge.” St. 1860, c. 103.

Blasting of rocks in Boston within one hundred rods of public place or highway, without license, forbidden. St. 1868, c. 201.

Acts concerning the manufacture, storage, and sale of petroleum and its products. St. 1869, c. 152. — St. 1867, c. 286. — St. 1869, c. 345. — St. 1866, c. 285. (Prior acts repealed. St. 1865, c. 244. — St. 1866, c. 262.)

Additional provisions relative to dogs. St. 1867, c. 130. —

St. 1869, c. 250. (Prior laws repealed. St. 1864, c. 299.— St. 1865, c. 197.)

SECT. 52-56. Repealed and superseded by St. 1864, c. 299, s. 1-6, 13, which have been themselves repealed and superseded by St. 1867, c. 130, s. 1-6, 15. (See also repealed St. 1863, c. 113.)

SECT. 58. Repealed by St. 1864, c. 299, s. 13.

SECT. 59. "*Keeper of a dog.*" As to the meaning of the word "keeper" in this place, see *Barrett v. Malden & Melrose R.R.*, 3 Allen 101.

"*Any person injured by it.*" This includes injury to *property*. *Brewer v. Crosby*, 11 Gray 29.

The keeper of a dog has been held liable under this section for damages sustained in consequence of a sudden attack by the dog upon a horse, whereby the horse was frightened and rendered unmanageable. *Sherman v. Favour*, 1 Allen 191.

So, where a dog injures a minor child, the owner is liable to its parent for the loss of its services and for his expenses in its cure. *M'Carthy v. Guild*, 12 Met. 291.

Where damage was caused by two dogs together, belonging to different owners, each owner was held to be liable only for the damage caused by his own dog. *Buddington v. Shearer*, 20 Pick. 477.

The damages may be doubled either by the court or by the jury. *Pressey v. Wirth*, 3 Allen 191.

As to the form of declaration in an action under this section, see *Mitchell v. Clapp*, 12 Cush. 278.

SECT. 61. If after notice, as provided in this section, the owner does not kill his dog or keep it from going at large, he shall forfeit \$10 on proof that such dog is mischievous or dangerous. St. 1867, c. 130, s. 14. (St. 1865, c. 197, s. 4.)

SECT. 64-66. Repealed and superseded by St. 1864, c. 299, s. 7-9, 13, which have been themselves repealed and superseded by St. 1867, c. 130, s. 7-10, 14.

*Billiard Tables and Bowling Alleys.*

SECT. 71. So much of this section, "as relates to the hours of closing billiard and bowling rooms" repealed. St. 1866, c. 237.

An indictment under this section need not allege that the place was kept open for gain. *Commonwealth v. Colton*, 8 Gray 488.

For another case arising under this section, see *Commonwealth v. Emmons*, 98 Mass. 6.

SECT. 72. The provisions of this section "extended to all buildings or other places named in any license granted to common victuallers by the county commissioners or by the mayor and aldermen or selectmen of any city or town." St. 1862, c. 222.

*Theatrical Exhibitions, Public Shows, Masked Balls, &c.*

SECT. 74. This section does not apply to a school for the teaching of dancing, although admittance thereto is paid for on each evening. *Commonwealth v. Gee*, 6 Cush. 174, 179.

An actor may maintain an action for his services at an unlicensed theatrical exhibition, unless it appears that he knew it was not licensed. *Roys v. Johnson*, 7 Gray 162.

SECT. 75. As to the form of an indictment under this section, see *Commonwealth v. Twitchell*, 4 Cush. 74.

SECT. 79. See further provisions on this subject in "an act to suppress the exhibitions of the fighting of birds and animals." St. 1869, c. 435.

## PART II.

---

OF THE ACQUISITION, THE ENJOYMENT, AND THE TRANSMISSION OF PROPERTY, REAL AND PERSONAL; THE DOMESTIC RELATIONS, AND OTHER MATTERS CONNECTED WITH PRIVATE RIGHTS.

---

### TITLE I.

OF REAL PROPERTY AND THE ALIENATION THEREOF.

ALL lands previously known as Indian lands, and rightfully held by any Indian in severalty, and all such lands which have been or may be set off to any Indian, to be the property of such person and his heirs in fee-simple, provided, &c. St. 1869, c. 463, s. 2.

### CHAPTER LXXXIX.

OF ALIENATION BY DEED; THE LEGAL FORMALITIES, CONSTRUCTION, AND OPERATION OF DEEDS FOR THE CONVEYANCE OF LANDS.

#### *General Provisions.*

SECT. 1. A deed which is *neither acknowledged nor recorded* will nevertheless be a valid conveyance, except as against persons "other than the grantor, and his heirs and devisees, and persons having actual notice thereof," as provided in section 3. *Dole v. Thurlow*, 12 Met. 157, 162. — *Marshall v. Fisk*, 6 Mass. 24. — *Call v. Buttrick*, 4 Cush. 345, 350.

But a writing *not under seal* will not be effectual to pass an interest in real estate, even as against the grantor and his heirs. *Stewart v. Clark*, 13 Met. 76.



It will not affect the validity of the record of a deed, that such deed is not recorded till after the death of the grantor. *Terry v. Briggs*, 12 Met. 17, 23.

“*By any person having authority to convey.*” These words “are material, and indicate the intention of the statutes that the right of the grantor only should pass by such conveyance. If the grantor had no right, then nothing would pass by the deed.” *Bates v. Norcross*, 14 Pick. 224, 230.

By St. 1869, c. 463, s. 2, it was provided that all *Indians* should thereafter have the same rights as other citizens to take, hold, convey, or transmit real estate.

SECT. 2. The right of a person to erect and maintain a mill-dam on land of another is an “estate or interest in land” within the meaning of this section. *Stevens v. Stevens*, 11 Met. 251, 254. — *Cook v. Stearns*, 11 Mass. 533, 536. So of a right to flow the land of another. *Fitch v. Seymour*, 9 Met. 462, 466.

A mortgagee, by an oral assent to a lease given by the mortgagor after the execution of the mortgage, will not make such lease valid as against himself. *Haven v. Adams*, 4 Allen 80, 93.

Oral leases are not absolutely void. “They regulate the terms of payment of rent, and length of time for giving notice to quit, and are to some extent efficacious.” They may also determine the time when the tenancy will expire by its own limitation. *Elliott v. Stone*, 1 Gray 571, 574.

On the question whether, in case of an oral contract affecting an interest in real estate, there would be any remedy by an action upon the *contract*, though no right to the premises, see *Burton v. Scherpf*, 1 Allen 133.

SECT. 3. For a consideration of the general intent of this section, see *Dole v. Thurlow*, 12 Met. 157, 162.

An unrecorded deed made by a man before his marriage, and of which his wife has no notice, will be valid and effectual as against her claim for dower in the estate conveyed by such deed. *Blood v. Blood*, 23 Pick. 80, 85.

The laws requiring the recording of deeds apply to assignments of mortgages. *Wolcott v. Winchester*, 15 Gray 461, 463. — *Clark v. Jenkins*, 5 Pick. 280.

*"Against any person other than the grantor," &c.* It seems that an assignee in insolvency of one who is the grantor in an unrecorded deed, stands in the same position as the insolvent himself, and cannot set up a title in opposition to such deed. *Stetson v. Gulliver*, 2 Cush. 494, 498. See also *Pratt v. Wheeler*, 6 Gray 520, 523. — *Audenried v. Betterley*, 5 Allen 382, 386. But see, contra, *Bingham v. Jordan*, 1 Allen 373. — *Briggs v. Parkman*, 2 Met. 258.

*"And persons having actual notice thereof."* This clause was first inserted in the Revised Statutes of 1836, the legislature then adopting an exception which had been engrafted upon the law by judicial exposition. See *Lawrence v. Stratton*, 6 Cush. 163, 166, 167.

*It seems* that, even as against persons having actual notice, a deed must be recorded before *the trial* of an action brought for the recovery of the land conveyed by it. *Wolcott v. Winchester*, 15 Gray 461, 467.

By "*actual notice*" is not meant certain and positive knowledge, such as one would acquire by seeing the deed or being told thereof by the grantor, but such notice as men usually act upon in the ordinary affairs of life. *Curtis v. Mundy*, 3 Met. 405.

In *George v. Kent*, 7 Allen 16, 18, however, it was said that "The case of *Curtis v. Mundy* is to some extent overruled by the later cases; yet none of them hold it to be necessary that the notice shall be by actual exhibition of the deed. Intelligible information of a fact, either verbally or in writing, and coming from a source which a party ought to give heed to, is generally considered as notice of it, except in cases where particular forms are necessary."

Prior to the Revised Statutes an implied or constructive notice was held to be sufficient, but now no such notice is of any

effect. *Parker v. Osgood*, 3 Allen 487, 489. — *Pomroy v. Stevens*, 11 Met. 244, 247. — *Farnsworth v. Child*, 4 Mass. 637, 639. — *Marshall v. Fisk*, 6 Mass. 24, 30. — *M'Mechan v. Grifing*, 3 Pick. 149, 154. See also *Reading of Judge Trowbridge*, 3 Mass. 575, 579.

Thus, the open occupation, possession, cultivation, and fencing of land by one who has an unrecorded deed thereof, will not of itself be evidence of "actual notice" of such deed. *Pomroy v. Stevens*, 11 Met. 244. — *Mara v. Pierce*, 9 Gray 306. — *Dooley v. Wolcott*, 4 Allen 406. But proof of such facts will be competent for the consideration of the jury, if accompanied by other evidence of actual notice. *Sibley v. Leffingwell*, 8 Allen 584. — *Mara v. Pierce*, 9 Gray 306, 307.

Nor is the fact that land is assessed to one who holds an unrecorded deed, evidence of such notice. *Parker v. Osgood*, 3 Allen 487, 490.

Nor the fact that the party to be affected with notice had heard a report that his grantor had conveyed all his property to another for the payment of his debts. *Richardson v. Smith*, 11 Allen 134.

But where A. takes a deed which describes the land conveyed as bounding "on land of B.," this will amount to actual notice to A. of B.'s unrecorded deed to such adjoining land. *Pike v. Goodnow*, 12 Allen 472, 474. — *George v. Kent*, 7 Allen 16, 18.

When the *whole* interest of a mortgagee in the mortgaged premises is assigned or conveyed without any transfer of the note secured by the mortgage, the absence of such transfer of the note will amount to notice, to the grantee, of a prior unrecorded assignment of the mortgage. Otherwise, however, of a conveyance or release, by a mortgagee, of a *portion* of the mortgaged premises to the owner of the equity in such portion. *Wolcott v. Winchester*, 15 Gray 461, 463.

Where a mortgagor gave a quitclaim deed of the mortgaged premises to the mortgagee, describing them in the deed as subject to the mortgage to the latter, and excepting such mortgage

under the covenant against encumbrances, it was held to be a question for the jury whether an attaching creditor of the mortgagee had, by reason of such references in the deed to the mortgagee, notice of an unrecorded assignment of the mortgage. *Clark v. Jenkins*, 5 Pick. 280.

Where a creditor, knowing that his debtor was making a deed of his real estate, attached such real estate before the deed was recorded, but not before it was executed and delivered, it was held that the attachment was good. *Cushing v. Hurd*, 4 Pick. 252.

It seems that, when one has notice of the *existence* of an unrecorded deed, he has notice of *all its contents*. *George v. Kent*, 7 Allen 16. — *Pike v. Goodnow*, 12 Allen 472, 474.

If a grantee who takes with notice of a prior unregistered deed, conveys to a second grantee, who has like notice, the latter, as well as the former, is precluded from setting up his title as against the prior unregistered deed. *Adams v. Cuddy*, 13 Pick. 460, 464.

But though the grantee of an estate have notice of a prior unregistered deed thereof, his attaching creditor, who has no such notice, will hold the estate as against such unregistered deed. *Coffin v. Ray*, 1 Met. 212.

And where the title has once passed into one in whom it is valid by reason of his want of notice of the unregistered deed, it will remain valid in the hands of subsequent purchasers, even though they have full notice of such deed. *Glidden v. Hunt*, 24 Pick. 221, 225. — *Trull v. Bigelow*, 16 Mass. 406, 419. The same rule holds in the case of an encumbrance which does not appear of record. *Boynton v. Rees*, 8 Pick. 329, 332.

It has been held in two early cases that one, whose title is invalid as against a prior unrecorded deed of which he has notice, may, even after the recording of such prior deed, convey a good title to one who has no actual notice of such deed. *Connecticut v. Bradish*, 14 Mass. 296, 303. — *Trull v. Bigelow*,

16 Mass. 406, 418. — See also *Adams v. Cuddy*, 13 Pick. 460, 464. — *Gliddin v. Hunt*, 24 Pick. 221, 225. But see *Flynt v. Arnold*, 2 Met. 619, 624, where these decisions are doubted. The point involved in these cases is a difficult one, — for if the law be held in accordance with the above cases of Connecticut *v. Bradish* and *Trull v. Bigelow*, then one who by delay in recording his deed has enabled a fraudulent grantee of the same estate to anticipate him at the registry, will, even after the recording of his own deed, hold a title liable to be divested whenever the fraudulent grantee can find an innocent purchaser. If, on the other hand, the innocent purchaser cannot hold the estate under these circumstances, then in searching the title of an estate it becomes important to examine the conveyances made by each owner, even subsequently to the recording of the deed from him, through which the title is traced.

One whose title is voidable for the reason that he obtained his deed from his grantor by fraud and without consideration, may, after his deed has been duly recorded, convey to a party, who has no notice of the fraud and want of consideration, a title valid as against the original grantor. *Dodd v. Cook*, 11 Gray 495. — *Somes v. Brewer*, 2 Pick. 184, 191.

The registry of a deed is constructive notice only to those subsequently acquiring title under the same grantor. *George v. Wood*, 9 Allen 80, 83. — *Bates v. Norcross*, 14 Pick. 224, 231. — *Tyler v. Hammond*, 11 Pick. 193, 216. Thus it has been held that the owner of land is not supposed to know of recorded deeds thereof made by strangers. *Bates v. Norcross*, 14 Pick. 224, 231. And a mortgagee, releasing a portion of the premises covered by his mortgage, is not bound to take notice of conveyances from the mortgagor recorded subsequent to his own mortgage. *George v. Wood*, 9 Allen 80.

Where a conveyance was made to one who on the next day, and without having had any actual possession of the estate, conveyed it to a third party, and afterwards, but before either of the deeds had been recorded, all the real estate of the

first grantee was attached by a creditor who does not appear to have had knowledge of either of such conveyances, it was held that such attachment would not hold the estate so conveyed; an unrecorded deed being thus held to be valid and effectual as against one who had no notice of it. *Haynes v. Jones*, 5 Met. 292.

An unrecorded deed will not be good as against one having actual notice of it, where such deed has been cancelled and the party has notice of that fact also. *Holbrook v. Tirrell*, 9 Pick. 105. — *Lawrence v. Stratton*, 6 Cush. 163, 168. — *Howe v. Wilder*, 11 Gray 267, 268.

See section 15 of this chapter for a provision similar to that contained in this section.

SECT. 4. Prior to St. 1791, c. 60, an entail could only be barred by a common recovery suffered by the tenant in tail in possession. *Hall v. Thayer*, 5 Gray 523, 528, 529.

By virtue of St. 1791, c. 60, s. 1, the same object could be accomplished by a deed of the tenant in tail, executed in the presence of two witnesses, actually given for a good or valuable consideration, *bonâ fide*, and acknowledged and recorded. See *Holland v. Cruft*, 3 Gray 162, 182, 183. — *Soule v. Soule*, 5 Mass. 61. — *Lithgow v. Kavanagh*, 9 Mass. 161, 170, 177. — *Wheelwright v. Wheelwright*, 2 Mass. 447. — *Nightingale v. Burrell*, 15 Pick. 104, 120.

Since the Revised Statutes no peculiarities in the mode of conveyance have been required, a conveyance "in fee-simple by a deed in common form" being all that is necessary. See Report of Commissioners on Rev. St. note to c. 59, s. 3.

Under St. 1791, c. 60, husband and wife by their joint deed might bar the entail of an estate of which they were seised in her right. *Nightingale v. Burrell*, 15 Pick. 104, 117.

It seems that the entail may be barred in an undivided portion of an estate tail. *Hall v. Thayer*, 5 Gray 523.

SECT. 8. This provision was first inserted in the Revised Statutes (Rev. St. c. 59, s. 5). It had however been previously

held, contrary to the strict rule of the common law, that a deed of quitclaim and release was a sufficient conveyance to pass an estate, although the releasee was not already in possession. *Russell v. Coffin*, 8 Pick. 143. — *Pray v. Pierce*, 7 Mass. 381. — *Freeman v. McGaw*, 15 Pick. 82, 85.

SECT. 12. The intention of this section was to abolish the rule in *Shelley's case* (1 Coke's Rep. 94). According to that rule, which was formerly in force in Massachusetts, a conveyance or devise of an estate to one for life with remainder to his heirs, was held to vest the fee in the first taker, the word "heirs" being construed as a word of limitation and not of purchase. The first statute on this subject was St. 1791, c. 60, s. 3, which provided that such a *devise* should vest an estate for life only in the first taker and a remainder in fee in his heirs. See *Bowers v. Porter*, 4 Pick. 198, 206. — *Steel v. Cook*, 1 Met. 281. — *Richardson v. Wheatland*, 7 Met. 169, 172. This section, following Rev. St. c. 59, s. 9, applies to *deeds* as well as to *devises*. See Report of Commissioners on Rev. St. note to c. 59, s. 9.

A devise to a daughter of "the improvement of" a farm, "the said premises to be equally divided between all her legal heirs at her decease," has been held to come within this section. *Bowers v. Porter*, 4 Pick. 198, 202.

In a case where a clause, which, if it had stood alone, would have brought the devise within this section, followed a provision which clearly gave an estate tail to the first taker, it was held that this section would not apply. *Weld v. Williams*, 13 Met. 486, 496.

Where an equitable interest is given to one for life, and at his death the legal estate is given to his heirs, this section will apply to prevent the first taker from acquiring an equitable fee-simple. *White v. Woodberry*, 9 Pick. 136, 138.

This section was not intended to prohibit or restrain the creation of estates tail by language, which, as in the case of a devise to one, and if he dies without issue, then to his heirs,

has according to well established rules been held to create such estates. *Hayward v. Howe*, 12 Gray 49, 52.

SECT. 13. By the rule of the common law an estate in joint tenancy was created by every conveyance of land to two or more persons, except husband and wife, when made without any restrictive, exclusive, or explanatory words. 4 Com. Dig. 228. This rule was first changed in this state by St. 1785, c. 62, s. 4, substantially re-enacted in Rev. St. c. 59, s. 10, and in this section. St. 1785, c. 62, s. 4, in terms applied to all gifts, grants, &c., "*which have been or shall be made,*" and such retrospective effect of the law was held not to be unconstitutional, since its operation, in changing joint tenancies into tenancies in common, made the estates affected more valuable. *Miller v. Miller*, 16 Mass. 59, 61.

SECT. 14. "*Shall not apply to mortgages.*" With regard to *mortgages* to two or more, the nature of the estate granted depends in each case upon the character of the mortgage. If it be given to secure a debt due to the mortgagees jointly, it will be construed as giving an estate in joint tenancy, — if to secure separate debts, obligations, or duties, then as creating a tenancy in common. *Gilson v. Gilson*, 2 Allen 115, 117. — *Burnett v. Pratt*, 22 Pick. 556. — *Blake v. Sanborn*, 8 Gray 154. — *Appleton v. Boyd*, 7 Mass. 131, 134. But even when a joint debt is secured, it has been held that, after foreclosure, the mortgagees, though joint tenants before, then become tenants in common of the mortgaged premises. *Goodwin v. Richardson*, 11 Mass. 469. — *Burnett v. Pratt*, 22 Pick. 556, 558.

"*Nor to devises or conveyances made in trust.*" These, if made to two or more, will create estates in joint tenancy, even though the devise or grant be simply to the trustees and their heirs. *Webster v. Vandeventer*, 6 Gray 428, 429.

"*Or made to husband and wife.*" A devise or conveyance to *husband and wife* creates, not strictly a joint tenancy, but "one indivisible estate in them both and the survivor of them." *Wales v. Coffin*, 13 Allen 211, 215. — *Shaw v. Hearsey*, 5 Mass. 521. — *Fox v. Fletcher*, 8 Mass. 274.



*"Nor to a devise or conveyance in which it manifestly appears,"* &c. As to what will be sufficient to show such manifest intent, see *Nash v. Cutler*, 16 Pick. 491, 497. — *Stimpson v. Batterman*, 5 Cush. 153, 155.

SECT. 15. *"Persons having actual notice thereof."* The continued possession of land by the grantor, after a conveyance thereof with a bond of defeasance, which bond is not recorded, is no notice of such bond. *Hennessey v. Andrews*, 6 Cush. 170, 172. — *Newhall v. Pierce*, 5 Pick. 450. See also cases cited under section 3 of this chapter.

It seems that the notice must be not merely of a bond to reconvey, but of one executed on the same day with the conveyance, and so executed and delivered as to be a part of the same transaction and constitute a mortgage. *Newhall v. Burt*, 7 Pick. 156, 158.

It is questionable whether an instrument of defeasance, especially if it be not under seal, must be acknowledged before being recorded. See *Stetson v. Gulliver*, 2 Cush. 494, 497. But compare remarks of SHAW, C. J., in *Dole v. Thurlow*, 12 Met. 157, 163.

The recording of an instrument of defeasance is not necessary in order to give it full effect as between the parties. *Bayley v. Bailey*, 5 Gray 505, 510.

SECT. 16. See chapter 161, sect. 59 and 60, for provisions making it an offence punishable with fine and imprisonment to convey land without notice of encumbrances or attachments.

SECT. 17. Quære, as to the effect of this section to change the rule of the common law that a covenant against encumbrances does not run with the land and cannot be sued by an heir or assignee of the covenantee. See *Whitney v. Dinsmore*, 6 Cush. 124, 128. — *Clark v. Swift*, 3 Met. 390. — *Thayer v. Clemence*, 22 Pick. 490, 493.

*Acknowledgment and Proof of Deeds.*

SECT. 18. *"By the grantors or one of them."* An acknowledgment by one of several grantors was first authorized by

statute in Rev. St. c. 59, s. 12. It had however been previously held to be sufficient. *Catlin v. Ware*, 9 Mass. 218. — *Shaw v. Poor*, 6 Pick. 86.

In the latter of the above cited cases an acknowledgment by one of two grantors was held to be good, although the grantors were separately seised of distinct parts of the premises conveyed, and the acknowledging grantor had no interest in that portion of the granted premises concerning which the question arose. *Shaw v. Poor*, 6 Pick. 86.

In a recent case an acknowledgment, by a husband alone, of a deed of his wife's separate estate, made by him jointly with her after issue born, was held to be sufficient. *Palmer v. Paine*, 9 Gray 56.

SECT. 19. "Justices of the peace may take acknowledgments of deeds and other instruments in any county." St. 1863, c. 157, s. 1. They had this authority even prior to this statute. *Learned v. Riley*, 14 Allen 109.

"The acknowledgment of deeds may be made before any notary public in this commonwealth." Previous acknowledgments so made, declared to be valid. St. 1867, c. 250.

For provisions for acknowledgments before certain officers by persons in the land or naval service of the United States and without the state, see St. 1863, c. 41, s. 2, 3. — St. 1864, c. 262.

As to the meaning of the word "*magistrate*" in this section, see *Scanlan v. Wright*, 13 Pick. 523, 528. — *Palmer v. Stevens*, 11 Cush. 147, 152.

SECT. 20. "*Departs from the state.*" It seems that this refers only to a departure for the purpose of taking up a permanent residence elsewhere. *Sacket's Case*, 1 Mass. 58.

SECT. 21. See a case in which, although one witness was present and able to testify, yet as such witness was not able to recollect the circumstances or even to testify to her own handwriting, the deed was allowed to be proved upon proof of the handwriting of the grantor. *Thomas v. Le Baron*, 8 Met. 355, 358, 361.

SECT. 24. See note to section 21.

SECT. 28. "*No deed shall be recorded without such certificate.*" If a deed without any certificate of acknowledgment or proof be recorded, such recording will be a mere nullity. *Pidge v. Tyler*, 4 Mass. 541, 547. — *Blood v. Blood*, 23 Pick. 80. So where a deed was acknowledged before a register of deeds, when it was handed to him for record, it was held that, as against an attaching creditor of the grantor, the deed was not to be considered as recorded, until the certificate of acknowledgment was written out. *Sigourney v. Larned*, 10 Pick. 72.

*It seems* that by the word "*deed*" in this section is intended only *deeds of conveyance*, and that bonds of defeasance and other instruments which, though under seal, are not properly deeds of conveyance, do not require to be acknowledged before being recorded. See *Stetson v. Gulliver*, 2 Cush. 494, 497. But see contra, *Valentine v. Piper*, 22 Pick. 85, 91.

By St. 1869, c. 167, it was provided that conveyances *from the United States* might be recorded without having been acknowledged.

SECT. 29. Prior to St. 1849, c. 205, powers of attorney for the conveyance of real estate were not required to be acknowledged and recorded. *Valentine v. Piper*, 22 Pick. 85, 90.

*Discharge of Mortgages.*

SECT. 30. As to the rights of a mortgagor, when an assignee of the mortgage, who has not had the assignment to him recorded, proposes to execute a discharge, but not to record his assignment, see *Wolcott v. Winchester*, 15 Gray 461, 467.

## CHAPTER XC.

OF ESTATES IN DOWER, BY THE CURTESY, FOR YEARS, AND AT WILL, AND GENERAL PROVISIONS CONCERNING REAL ESTATE.

SECT. 1. It seems that a woman will be entitled to dower in an estate for the conveyance of which to him her deceased husband had entered into a contract in his lifetime, specific performance of which contract is decreed in equity after his death. *Reed v. Whitney*, 7 Gray 533, 537.

A woman will not be barred of her dower by leaving her husband and living with an adulterer. *Lakin v. Lakin*, 2 Allen 45.

For modes in which a woman may be "lawfully barred" of her dower, see Gen. St. c. 90, s. 8-11.—c. 91, s. 24.—c. 107, s. 38.

SECT. 2. This section was first inserted in the Revised Statutes (Rev. St. c. 60, s. 2), in confirmation of previous decisions of the supreme court. See *Snow v. Stevens*, 15 Mass. 278.—*Gibson v. Crehore*, 3 Pick. 475, 481.—*Sheafe v. O'Neil*, 9 Mass. 9, 13.

Although the party claiming under the husband, upon redeeming the mortgage, has it *discharged of record*, the widow must repay her proportion of the sum paid by him, or take her dower according to the value of the estate after deducting that sum. *Newton v. Cook*, 4 Gray 46, 49.—*Pyncheon v. Lester*, 6 Gray 314.

As against the *mortgagee* and those claiming under him, the widow of the mortgagor can only have dower by redeeming the whole mortgage. *McCabe v. Bellows*, 7 Gray 148.

SECT. 3. "*Of which her husband died seised.*" It has been held that, as against the mortgagee and those claiming under him, a husband does not, within the meaning of this section, "die seised" of lands which are subject to a mortgage given by him, even though he is in possession of the premises

at the time of his death. *Raynham v. Wilmarth*, 13 Met. 414. — *Sheafe v. O'Neil*, 9 Mass. 9.

But in a more recent case it was held that, when the mortgagee does not object, it is the duty of the judge of probate to assign dower to the widow of the mortgagor pursuant to this section. *Henry's Case*, 4 Cush. 257.

SECT. 7. With regard to the meaning of this section, see *Gibson v. Crehore*, 3 Pick. 475, 478. — *Gibson v. Crehore*, 5 Pick. 146, 159.

SECT. 8. "*And therein releasing her claim to dower.*" In *Learned v. Cutler*, 18 Pick. 9, it was held that it was not necessary that dower should be released *eo nomine*, but that any other words, showing an intention on the wife's part to relinquish her dower, would be sufficient. And it was said that if she joined with her husband in the sale and conveyed the land jointly with him, this generally would be a sufficient indication of her intention to exclude herself from any claim of dower. This case, however, was decided upon the statutes existing prior to the Revised Statutes of 1836, and which did not contain the words quoted above.

"*Executed separately.*" These words were first inserted in the General Statutes of 1860. Prior to that time the separate deed of a married woman was not valid to bar her dower in lands previously conveyed by her husband. *Page v. Page*, 6 Cush. 196.

A writing signed by a married woman, but not sealed nor acknowledged, will not bar her dower. *Giles v. Morse*, 4 Gray 600.

As to the law relative to release of dower prior to the Revised Statutes of 1836, see *Fowler v. Shearer*, 7 Mass. 14, 20. — *Page v. Page*, 6 Cush. 196, 197. — *Stearns v. Swift*, 8 Pick. 532.

SECT. 9. For the law, prior to the Revised Statutes of 1836, on the subject of barring dower by a jointure, see *Hastings v. Dickinson*, 7 Mass. 153. — *Vincent v. Spooner*, 2 Cush. 467, 472. — *Bigelow v. Hubbard*, 97 Mass. 195, 197.

SECT. 10. Prior to the Revised Statutes dower could not be barred by a *pecuniary* provision as provided in this section. See *Gibson v. Gibson*, 15 Mass. 106, — also cases cited under section 9.

When one covenanted with a third person that he would, by last will or otherwise, cause certain sums to be paid and secured for his intended wife in lieu of her dower, and she assented thereto, and the husband died, having made no provision in his lifetime by will or otherwise, but leaving sufficient estate for the purpose in the hands of his executor, who in fact offered to fulfil the covenant of the deceased husband, it was held that a pecuniary provision had been made within the meaning of this section, and that the dower of the wife was barred. *Vincent v. Spooner*, 2 Cush. 467, 474.

An ante-nuptial settlement, though valid to bar dower under this or the preceding section, will not, even though expressly so provided, bar a widow's right at law to her distributive share of her husband's estate. *Sullings v. Richmond*, 5 Allen 187. But such an agreement, if fairly performed on the part of her husband, will be enforced in equity as against the wife. *Sullings v. Sullings*, 9 Allen 234, 237.

SECT. 12. "*A widow shall not be endowed of wild lands.*" This was inserted in the Revised Statutes of 1836 in adoption of the rule laid down in *Conner v. Shepherd*, 15 Mass. 164. See also *White v. Cutler*, 17 Pick. 248.

"*Nor of wild lands conveyed by him, although they should be afterwards cleared.*" This was in recognition of *Webb v. Townsend*, 1 Pick. 21.

— "*But this shall not bar her right of dower in any wood lot,*" &c. This adopted the rule in *White v. Willis*, 7 Pick. 143. See also *Shattuck v. Gregg*, 23 Pick. 88. As to the widow's right to cut wood from such a lot, see *White v. Cutler*, 17 Pick. 248.

In a case which arose prior to the Revised Statutes, a widow was held to be dowable of *mines* and *quarries* which her husband

owned and worked in his lifetime. *Billings v. Taylor*, 10 Pick. 460.

SECT. 13. This section was inserted in the Revised Statutes in adoption of the law as stated in *Scott v. Hancock*, 13 Mass. 162, 168.

*"Or is deprived of the provision made for her by will."* A widow was held to have been so deprived, where her husband had given her in his will all the residue of his property after the payment of his debts, and she had elected to take such provision in lieu of dower, but it had afterwards appeared that *all* the property of the deceased was needed for the payment of his debts. *Thompson v. McGaw*, 1 Met. 66, 73.

SECT. 14. As to what is waste by a tenant in dower, see *Padelford v. Padelford*, 7 Pick. 152.

SECT. 19. A husband, during the life of his wife, has not, even after issue born, any interest in his wife's *separate* real estate, which can be seized on an execution against him (*Staples v. Brown*, 13 Allen 64) or which will pass to his assignee in insolvency (*Lynde v. McGregor*, 13 Allen 182), or, it seems, which he can convey by his separate deed. (*Lynde v. McGregor*, 13 Allen 182, 184.) But it seems that the rule is different with regard to his wife's real estate, which is not her separate property. See *Mechanics Bank v. Williams*, 17 Pick. 438, 441. — *Gardner v. Hooper*, 3 Gray 398. — *Staples v. Brown*, 13 Allen 64, 65.

SECT. 20–22. These provisions were first enacted in St. 1834, c. 162. Prior to that statute all such terms were held to be personal property. *Ex parte Gay*, 5 Mass. 419.

SECT. 23. For the reason for inserting this section, see *Whitman v. Hapgood*, 10 Mass. 437.

SECT. 24. This section declares the law as it stood prior to statute provision. See *Daniels v. Richardson*, 22 Pick. 565, 569. — *Montague v. Gay*, 17 Mass. 439.

It has been said that this section and section 26 were not intended to declare when and by what acts a right to rent shall

be created, vested, and transferred, but only how it may be recovered when due. *Fitch v. Stevens*, 2 Met. 504, 505. Consequently it has been held, in accordance with the principles of the common law, that when a lessee does not assign his interest in a part or the whole of the land for the *whole remainder* of the term, but only underlets for a *part* of such remainder, the landlord cannot maintain an action for the rent or for use and occupation against the sub-lessee. *Fitch v. Stevens*, 2 Met. 504. — *Shattuck v. Lovejoy*, 8 Gray 204.

Act rendering lessees and tenants at will liable to pay a proportional part of their rent in cases in which their lease or tenancy is terminated, before the day on which rent is payable, by the termination of the lessor's estate, such estate being determinable on a life or on a contingency, — by surrender, either express or by operation of law, — by notice to quit for non-payment of rent, — or, in the case of a tenancy at will, by the death of any party. St. 1869, c. 368, s. 1-3.

Provision for recovery back by lessee of proportional part of rent already paid by him, when his tenancy is determined, in any of the ways above mentioned, before the end of the period for which the rent was paid. St. 1869, c. 368, s. 4.

SECT. 25. At common law a tenant at sufferance was not liable to pay rent. *Flood v. Flood*, 1 Allen 217, 218. — *Delano v. Montague*, 4 Cush. 42, 46.

For a case where rent was recovered under this section, see *Bunton v. Richardson*, 10 Allen 260.

SECT. 29. It seems that this section merely declares the law as it existed prior to statute. See *Bell v. Tuttle*, 1 Allen 219.

It seems that this section would not apply to the rent of a boarding house, at least if kept by a single woman without a family. *Prentice v. Richards*, 8 Gray 226. See also *Lincoln v. Dunbar*, 7 Allen 264, 265. — *Plympton v. Roberts*, 12 Allen 366.

SECT. 30, 31. For the law on the subject of "notice to quit" prior to statute, see *Rising v. Stannard*, 17 Mass. 282, 286. — *Ellis v. Paige*, 1 Pick. 43, 47. — *Coffin v. Lunt*, 2 Pick. 70.



For decisions relative to these sections, and for forms of notices to quit, see "Crocker's Notes on Common Forms" under "Notice to Quit."

SECT. 32. This provision was first enacted by St. 1852, c. 144. As to the law upon the subject prior to statute, see *Rogers v. Sawin*, 10 Gray 376. — *Carrig v. Dee*, 14 Gray 583. — *Richardson v. Pond*, 15 Gray 387, 389. — *Fifty Associates v. Tudor*, 6 Gray 255, 259. — *Atkins v. Chilson*, 7 Met. 398, 403.

SECT. 33. "*Unless such use has been continued uninterrupted for twenty years.*" As to what is a sufficient interruption to prevent the twenty years from running, see *Pollard v. Barnes*, 2 Cush. 191, 197.

The twenty years mentioned in this section do not run against one who is insane when the adverse user commences. *Edson v. Munsell*, 10 Allen 557, 566.

SECT. 34. This section amended by St. 1867, c. 302, which provides for the posting of a public notice by any person who apprehends that an easement may be acquired by others over his land.

SECT. 36. A sale by a *guardian* of his ward's estate tail for the payment of debts, although not in terms provided for prior to the Revised Statutes, was valid under St. 1791, c. 60. *Williams v. Hitchborn*, 4 Mass. 189, 195.

The express exception of *estates tail in remainder* was first made in the Revised Statutes, but it has been held that the earlier St. 1791, c. 60 did not extend to them. *Holland v. Cruft*, 3 Gray 162, 182, 185.

SECT. 37. It seems that the contingent remainders, &c., referred to in this section, are those where the person to take is certain, as distinguished from those in which such person is not ascertained. See 4 Kent, Com. 261, 262. — *Winslow v. Goodwin*, 7 Met. 366, 377. — *Gardner v. Hooper*, 3 Gray 398, 405. — Report of Commissioners on Rev. St. of 1836, note to c. 60, s. 30.

For provisions for the sale, by order of the supreme court, of estates encumbered by contingent remainders, executory devises, or powers of appointment, see St. 1868, c. 287.

SECT. 38. Prior to St. 1852, c. 29, an alien could only take an estate defeasible at the suit of the commonwealth, and upon his death the estate vested immediately in the commonwealth. See *Slater v. Nason*, 15 Pick. 345, 349. — *Wilber v. Tobey*, 16 Pick. 177, 179. — *Foss v. Crisp*, 20 Pick. 121.

*Additional Provision.*

Enclosing or occupying, &c., of land of railroad corporation by adjoining owners, not to create any right to the land. St. 1861, c. 100.

---

## TITLE II.

---

### CHAPTER XCI.

#### OF TITLE TO REAL PROPERTY BY DESCENT.

“*Issue*” in this chapter means all the lawful lineal descendants of the ancestor. See Gen. St. c. 3, s. 17, cl. 9.

SECT. 1. This section applies to *contingent* as well as to *vested* interests in real estate. *Winslow v. Goodwin*, 7 Met. 363, 377. — *Dalton v. Savage*, 9 Met. 28, 37.

*First Clause.* “*In equal shares to his children,*” &c. Prior to 1790 the real estate of an intestate was not divided *equally* among his children, but the oldest son took a double share. The following is a short sketch of the changes in the law on this subject:—

In 1641, it was provided that, when one died intestate, the county court should have power “to divide and assign to the children or other heirs their several parts and portions out of

his estate ; provided the eldest son shall have a double portion, and where there are no sons, the daughters shall inherit as copartners, unless the court, upon just cause alleged, shall otherwise determine." Anc. Ch. p. 205.

In 1692, it was provided that the real and personal estate of an intestate should be distributed by the judge of probate " by equal portions to and among his children and such as shall legally represent them, if any of them be dead," " except the eldest son then surviving, where there is no issue of the first-born or of any other elder son, who shall have two shares or a double portion of the whole ; and where there are no sons, the daughters shall inherit as coparceners." Anc. Ch. p. 230.

In 1783, it was further provided that the issue of any elder son, who deceased before his father, should have two shares in right of such son. St. 1783, c. 36, s. 1.

And by St. 1789, c. 2, it was provided that the real and personal estate of persons dying after January 1, 1790, should " descend and be distributed in equal shares to and among his children and such as may legally represent them, if any of them be dead." This provision has been substantially re-enacted in St. 1805, c. 90, s. 1, — Rev. St. c. 61, s. 1, and in this section.

This section does not apply to estates tail, which therefore do not descend according to the rules here laid down, but according to those of the common law, that is, to the oldest son, &c. *Corbin v. Healey*, 20 Pick. 514, 516. — *Baker v. Mattocks*, Quincy's Mass. Reports 69. — *Wight v. Thayer*, 1 Gray 284.

*Fifth Clause.* Under this clause it was held that where the next of kin of a deceased intestate were a paternal grandfather and a maternal grandfather and grandmother, one-third of the estate went to each, although the two latter were husband and wife, and therefore to some intents but one person in law. *Knapp v. Windsor*, 6 Cush. 156.

*Sixth Clause.* “*By inheritance from such deceased parent.*”

One who takes by inheritance from a more remote ancestor, by right of representation of a deceased parent, does not take by inheritance from such parent within the meaning of this clause. *Sedgwick v. Minot*, 6 Allen 171.

*Seventh Clause.* See note to sixth clause.

*Ninth Clause.* But upon the death of an intestate, leaving no next of kin, widow, or husband, the commonwealth does not become seised of his estate until after an inquest of office declaring and establishing the title of the commonwealth by matter of record. *Wilbur v. Tobey*, 16 Pick. 177, 179.

SECT. 2. The first provision for inheritance by illegitimate children was made by St. 1828, c. 139.

“*And the lawful issue of an illegitimate person shall represent such person,*” &c. This clause was first inserted in St. 1851, c. 211;—prior to that statute, if an illegitimate child died before his mother, his children would not inherit her estate. *Curtis v. Hewins*, 11 Met. 294.

SECT. 3. Prior to the Revised Statutes of 1836, the mother of an illegitimate child did not inherit his estate. *Cooley v. Dewey*, 4 Pick. 93.

SECT. 4. In the corresponding section of the Revised Statutes of 1836 (Rev. St. c. 61, s. 4), this exception was added, “except that he shall not be allowed to claim, as representing either of his parents, any part of the estate of any of his kindred, either lineal or collateral.” This exception was repealed by St. 1853, c. 253.

It has been held to be the intent of this section, not that children, acknowledged as therein provided, shall be considered legitimate for purposes of descent only, but for all purposes, as for instance the acquiring of settlements as paupers. *Monson v. Palmer*, 8 Allen 551, 555. See also *Loring v. Thorn-dike*, 5 Allen 257, 263.

SECT. 5. As to the law relative to inheritance by kindred of

the half blood prior to the Revised Statutes of 1836, see *Sheffield v. Lovering*, 12 Mass. 489, 494.

SECT. 6. But advancements of personal property, are not, in determining the *widow's* share, to be considered as part of the personal estate of the deceased. See Gen. St. c. 94, s. 17.

SECT. 7. See *Bemis v. Stearns*, 16 Mass. 200.

SECT. 8. An advancement cannot be proved by oral testimony, nor in any other way than as provided in this section. *Barton v. Rice*, 22 Pick. 508.—*Bullard v. Bullard*, 5 Pick. 527. But a testator may by his will direct that certain gifts shall be taken as advancements, in which case they become so to all intents and purposes, not by force of the statute nor by virtue of their original character, but being made so by such will. *Bacon v. Gassett*, 18 Allen 334, 337.

*"Charged in writing by the intestate as an advancement."* As to what amounts to such a charge, see *Bigelow v. Poole*, 10 Gray 104.—*Ashley's Case*, 4 Pick. 21.—*Bulkely v. Noble*, 2 Pick. 337, 340.

*"Or acknowledged as such by the child or other descendant."* In a case arising prior to the present laws relating to the separate property of married women, it was held that a husband might make an acknowledgment of an advancement of personal property in behalf of his wife, who was insane and incapable of making the acknowledgment herself. *Hartwell v. Rice*, 1 Gray 587, 593.

SECT. 9. Interest is not chargeable on advancements. *Osgood v. Breed*, 17 Mass. 356.

## TITLE III.

## CHAPTER XCII.

## OF WILLS.

SECT. 1. "*Every person.*" As to the power of a *married* woman to make a will, see chapter 108, s. 9, 10.

"*Of sound mind.*" The burden of proving a testator's sanity is upon those offering the will, but, in the absence of evidence to the contrary, the legal presumption is in favor of the sanity of the testator. *Baxter v. Abbott*, 7 Gray 71, 83. — *Crowninshield v. Crowninshield*, 2 Gray 524.

A person under guardianship as a non compos is not necessarily incapable of making a valid will, but his guardianship is *primâ facie* evidence of his incapacity. *Crowninshield v. Crowninshield*, 2 Gray 524, 531. — *Breed v. Pratt*, 18 Pick. 115. — *Stone v. Damon*, 12 Mass. 488.

"*Excepting an estate tail.*" See *Hall v. Priest*, 6 Gray 18, 24.

*Contingent* as well as vested interests may be devised. *Dalton v. Savage*, 9 Met. 28, 37.

SECT. 2. At the common law, which was in force in this state prior to the Revised Statutes of 1836, a male infant of fourteen years or a female infant of twelve years of age might make a valid will of personal property. See *Deane v. Littlefield*, 1 Pick. 239, 243. — 2 Kent, Com. 242.

SECT. 3. Prior to the Revised Statutes a testator could not devise lands of which he was not seised at the time of his death. *Smithwick v. Jordan*, 15 Mass. 115. — *Ward v. Fuller*, 15 Pick. 185, 190. — *Poor v. Robinson*, 10 Mass. 181.

"*The devisee shall have the like remedy,*" &c. See *Brown v. Wells*, 12 Met. 501, 503.

SECT. 4. Prior to the Revised Statutes after-acquired lands

could not be devised. *Winchester v. Forster*, 3 Cush. 369. — *Ballard v. Carter*, 5 Pick. 112. — *Brigham v. Winchester*, 1 Met. 390. — *Hays v. Jackson*, 9 Mass. 149, 156.

The new rule established by the Revised Statutes has been held to apply to wills made prior to its enactment, provided the testator died subsequently to that time. *Cushing v. Aylwin*, 12 Met. 169, 174. — *Pray v. Waterston*, 12 Met. 262, 264.

An indirect result of the above change in the law is that *residuary* devises are no longer to be considered *specific*. *Blaney v. Blaney*, 1 Cush. 107, 116. Another result is that *lapsed* devises now pass to the residuary devisee. *Prescott v. Prescott*, 7 Met. 141, 146.

“*If such clearly and manifestly appears by the will to have been the intention of the testator.*” It has been held that this proviso is satisfied when “it appears by the whole scheme and tenor of the will that the testator intended to make a full and entire disposition of his whole property, real and personal.” *Winchester v. Forster*, 3 Cush. 366, 371. And it seems to be laid down as a general rule that, when a will purports to dispose of the testator’s whole estate or property, an intention to dispose of after-acquired property will be inferred, unless something in the will be opposed to such inference. *Cushing v. Aylwin*, 12 Met. 169, 175. — *Brimmer v. Sohler*, 1 Cush. 118, 133.

SECT. 5. As to the rule regarding wills made prior to May 1st, 1836, see *Richardson v. Noyes*, 2 Mass. 56, 59. — *Parker v. Parker*, 5 Met. 134, 138. Also Mass. Col. Law of 1651 in Anc. Ch. p. 85.

“*Unless it clearly appears by the will that the devisor intended to convey a less estate.*” Such intent need not be declared in express terms, but may be gathered from the will by a comparison of its several provisions and a clear deduction from them. Such inference must be clear and satisfactory to the mind, and it may be drawn from particular provisions incon-

sistent with an intent to give a fee, or from the general import, scheme, and object of the will. *Fay v. Fay*, 1 Cush. 93, 102. See also *Gleason v. Fayerweather*, 4 Gray 348. — *Bacon v. Woodward*, 12 Gray 376. — *Fearing v. Swift*, 97 Mass. 413, 415. — *Willcut v. Calnan*, 98 Mass. 75.

SECT. 6. For a review of the earlier statutes relating to the execution of wills, see *Chase v. Kittredge*, 11 Allen 49, 51. As to the effect of such earlier statutes, see also Winslow, *Ex parte*, 14 Mass. 421. — *Very v. Very*, 3 Pick. 374.

A testator cannot by a duly executed will reserve to himself a power to declare testamentary bequests by another instrument, to be signed by himself, but not attested in the manner prescribed in this section. *Thayer v. Wellington*, 9 Allen 283. But a testator may refer to a paper *already executed*, whatever may be the form of its execution, in such a way as to incorporate it into his will. Same case, p. 292.

Though a will be written on several *separate* pieces of paper, it will be valid if the different papers are obviously connected in their provisions, and sufficiently shown to have composed a connected series, and the same that are shown to have been attested by the witnesses. *Ela v. Edwards*, 16 Gray —.

*"Signed by the testator," &c.* It is a sufficient *signing* by the testator, if he makes a mark or cross, and his name is added by one of the attesting witnesses. *Nickerson v. Buck*, 12 Cush. 332. See also *Chase v. Kittredge*, 11 Allen 49, 59.

*"Attested and subscribed in his presence."* It is sufficient evidence that the attestation is made *in the presence of the testator*, if the facts show a possibility of his seeing the witnesses sign, unless controlled by other evidence showing that in fact he did not see them. *Dewey v. Dewey*, 1 Met. 349. But a will subscribed by the witnesses in a room connected with that in which the testator was lying, but not actually in his presence, view, or hearing, has been held not to be valid. *Boldry v. Parris*, 2 Cush. 433. And a will has been held to be invalid, when a witness subscribed his name in the absence of the tes-



tator and in anticipation of the testator's signature, although he afterwards acknowledged his signature in the testator's presence; and *it seems* that the attesting witnesses must actually sign, and not merely acknowledge, their signatures, in the presence of the testator, and that they must not subscribe their names until after the testator has himself signed the will. *Chase v. Kittredge*, 11 Allen 49. See also *Boldry v. Parris*, 2 Cush. 433, 438.

It is not necessary to the validity of a will that the witnesses should sign *in the presence of each other*. *Dewey v. Dewey*, 1 Met. 349. — *Hogan v. Grosvenor*, 10 Met. 54.

*"By three or more competent witnesses."* It is not necessary that the witnesses should actually *see the testator sign* the will, — it will be sufficient if he by words or by acts makes known to them that the signature is his, and any act or declaration, that carries by implication an averment of such fact, will be effectual for this purpose. *Nickerson v. Buck*, 12 Cush. 332. For instance a declaration by the testator that the instrument is his will. *Dewey v. Dewey*, 1 Met. 349, 352. See also *Hall v. Hall*, 17 Pick. 373. — *Hogan v. Grosvenor*, 10 Met. 54. — *Ela v. Edwards*, 16 Gray.

A person may be *incompetent* as a witness to a will either by reason of crime or of interest, the statute expressly excepting attesting witnesses to wills from the general rule that no person shall be excluded from giving evidence for such reasons. Gen. St. c. 131, s. 13, 14, 15. See also *Amory v. Fellowes*, 5 Mass. 219. — *Sears v. Dillingham*, 12 Mass. 358. — *Haven v. Hilliard*, 23 Pick. 10, 16. — *Sparhawk v. Sparhawk*, 10 Allen 155, 156. An incompetent witness is one who, at the time of attestation, would not be entitled to be heard and examined in a court of justice on the question of the due execution of the will. *Haven v. Hilliard*, 23 Pick. 10, 18.

One to whom a beneficial devise or legacy is given in a will is not however by reason thereof incompetent as a witness thereto, — such devise or legacy being made void by statute.

But this does not apply when there are, beside such witness, three other competent witnesses to the will. See section 10 of this chapter. Quære, as to the effect of a devise or legacy given to an attesting witness *in trust* for a third person. See *Loring v. Park*, 7 Gray 42. — *Paine v. Prentiss*, 5 Met. 396, 399.

“A mere charge on the lands of the devisor for the payment of debts shall not prevent his creditors from being competent witnesses to his will.” See section 10 of this chapter.

“An interest to disqualify a witness must be a present vested interest, and not uncertain and contingent.” It must also be “pecuniary, or such as directly or indirectly affects property.” Per WILDE, J., in *Hawes v. Humphrey*, 9 Pick. 350, 357.

A member of a corporation, to which property is given by will in trust for charitable purposes, is a competent witness to such will. *Loring v. Park*, 7 Gray 42.

An heir-at-law of a testator is a competent witness to a will which disinherits him. *Sparhawk v. Sparhawk*, 10 Allen 155.

A person named as an executor in a will is competent as a witness thereto. *Wyman v. Symmes*, 10 Allen 153.

“If the witnesses are competent at the time of attesting the execution of the will, their subsequent incompetency,” &c. With regard to this clause, see *Wyman v. Symmes*, 10 Allen 153, 155. — *Hawes v. Humphrey*, 9 Pick. 350, 356. — *Sears v. Dil-lingham*, 12 Mass. 358, 361.

SECT. 8. The term “will” in this section includes every kind of testamentary act, taking effect from the mind of the testator, and manifested by an instrument in writing. *Bayley v. Bailey*, 5 Cush. 245, 261.

It includes *nuncupative* wills as well as those in writing. *Slocumb v. Slocumb*, 13 Allen 38.

SECT. 11. “Signed, attested, and subscribed in the manner provided for making a will.” These words were inserted in the Revised Statutes in adoption of prior decisions of the supreme

court. See *Laughton v. Atkins*, 1 Pick. 535. — *Reid v. Borland*, 14 Mass. 208. — *Brown v. Thorndike*, 15 Pick. 388.

“An entire revocation by implication of law is limited to a very small number of cases. The marriage of a feme sole is held to be a revocation of her previous will, or at least a suspension, for there may be some doubt on that point. In the case of a man, the rule is now firmly established that marriage and the birth of a child shall be held to be an entire revocation. And a posthumous child is held to be within the rule. But when the facts, on which the revocation is ordinarily implied, have been contemplated and provided for in the will, no such presumption arises, and the will is not revoked.” Per SHAW, C. J., in *Warner v. Beach*, 4 Gray 162, 163.

A will is not revoked by the subsequent insanity of the testator, however long continued, and though circumstances have arisen which render it possible that, had the testator continued sane, he would have altered his will. *Warner v. Beach*, 4 Gray 162.

A partial revocation of a will may arise from an alienation of the estate devised. *Hawes v. Humphrey*, 9 Pick. 350. — *Brown v. Thorndike*, 15 Pick. 388, 407. So also from a material alteration in the devisor's title or interest in it. *Ballard v. Carter*, 5 Pick. 112, 116.

As to whether probate is necessary of an instrument purporting to be a revocation only, see *Laughton v. Atkins*, 1 Pick. 535.

SECT. 16. For cases arising under the similar provision of St. 1783, c. 24, s. 16, which provided for a penalty of five pounds upon an executor neglecting to offer a will for probate, see *Stebbins v. Lathrop*, 4 Pick. 33, 42. — *Hill v. Davis*, 4 Mass. 135, 139.

SECT. 19. It seems that, except as provided in this section, all the three witnesses to a will must be produced at the probate thereof, if living and subject to the process of the court. *Chase v. Lincoln*, 3 Mass. 236.

SECT. 22. "*If it appears that the instrument ought to be allowed.*" Upon the question of such allowance, the only matters open are whether the record presented is duly authenticated; whether the court, in which the will purports to have been allowed, had jurisdiction; whether there is in the county any estate, real or personal, on which the will may operate; and perhaps some other matters, such as actual fraud in obtaining the probate of the will. As to such matters however as the capacity and sanity of the testator, the due execution of the will, the competency of the witnesses, and the regularity of the probate proceedings, the judgment in the other state is conclusive. *Crippen v. Dexter*, 13 Gray 330, 333. — *Parker v. Parker*, 11 Cush. 519, 523. Quære, however, as to a will of real estate made in this state not in accordance with our laws, but proved in another state. See *Dublin v. Chadbourn*, 16 Mass. 433, 441. See also, the last clause of this section and section 8 of this chapter.

A will proved in another state, although a copy be not filed and recorded here according to the provisions of this and the preceding section, will, nevertheless, cause the personal property to vest in the executor appointed where the will was proved. *Hutchins v. State Bank*, 12 Met. 421, 425.

But the supreme court will not enforce in equity a trust of real estate arising under a will proved in a foreign country, but of which no copy has been filed in the probate court here. *Campbell v. Wallace*, 10 Gray 162.

SECT. 23. "*After allowing and recording a will \* \* \* the probate court shall grant letters,*" &c. Administration in this state, upon the estate situated here, may, however, be granted before the will of the deceased is proved in the state of his domicil. *Bowdoin v. Holland*, 10 Cush. 17, 20.

SECT. 24. This section repealed and superseded by St. 1861, c. 164.

SECT. 25. "*For any of his children.*" This section applies not only to children who are living when the will is made, but to those

who are *born afterwards* and before the death of the testator. *Bancroft v. Ives*, 3 Gray 367. *Posthumous* children are provided for by the next section.

The word "children" in this section applies only to such as are *legitimate*. *Kent v. Barker*, 2 Gray 535. But illegitimate children, whose parents subsequently intermarry, and who are acknowledged by their fathers, are to be considered legitimate for the purposes of this section. Gen. St. c. 91, s. 4. — *Kent v. Barker*, 2 Gray 535, 538. — *Monson v. Palmer*, 8 Allen 551, 554. — *Loring v. Thorndike*, 5 Allen 257, 263.

"*Unless it appears that such omission was intentional.*" This may be shown, not only from the language of the will, but by parol evidence of the acts and declarations of the testator. *Wilson v. Fosket*, 6 Met. 400. — *Converse v. Wales*, 4 Allen 512.

For cases where, from the tenor of the will, the omission has been presumed to have been intentional, see *Wilder v. Thayer*, 97 Mass. 439. — *Prentiss v. Prentiss*, 11 Allen 47. — *Wilder v. Goss*, 14 Mass. 357. — *Church v. Crocker*, 3 Mass. 17. — *Terry v. Foster*, 1 Mass. 146. — *Wild v. Brewer*, 2 Mass. 570. — *Loring v. Marsh*, 6 Wallace 337.

In the case of children born after the making of the will and before the death of the testator, it would seem that very positive evidence of an intent to omit to provide for them will be required. *Bancroft v. Ives*, 3 Gray 367. — *Prentiss v. Prentiss*, 11 Allen 47.

SECT. 28. When a devisee or legatee, who dies before the testator, is not a relation to him, or, being such relation, leaves no issue who survive the testator, the devise or legacy lapses. *Ballard v. Ballard*, 18 Pick. 41, 43. — *Prescott v. Prescott*, 7 Met. 141. — *Hooper v. Hooper*, 9 Cush. 122. — *Fisher v. Hill*, 7 Mass. 86.

This section applies as well to devises and legacies made *in trust* for a child or other relation as to those made directly to them. *Paine v. Prentiss*, 5 Met. 396.

The rule established in this section was in force as early as St. 1783, c. 24, s. 8.

SECT. 29. A *residuary* devisee is not entitled to contribution under the provisions of this section. *Blaney v. Blaney*, 1 Cush. 107, 114. — *Hays v. Jackson*, 6 Mass. 149, 155.

SECT. 30. "*By making a specific devise.*" A *residuary* devise is not to be considered as specific. *Blaney v. Blaney*, 1 Cush. 107, 115.

SECT. 34. See *Hays v. Jackson*, 6 Mass. 149.

SECT. 36. A *residuary devisee* is not entitled to contribution under this section, when his estate is taken for dower. *Blaney v. Blaney*, 1 Cush. 107.

SECT. 38. This section was passed in recognition of the law as previously laid down in *Dublin v. Chadbourn*, 16 Mass. 433.

A will not proved in the probate court is, it seems, not admissible as evidence for any purpose. *Shumway v. Holbrook*, 1 Pick. 114, 116.

But a will proved in a probate court of another state, though a copy has not been filed here according to sections 21-23 of this chapter, may have a certain effect here as regards the *personal* property of the testator. *Hutchins v. State Bank*, 12 Met. 421, 425.

As to the extent to which the regularity of proceedings upon the proof of a will in the probate court may be inquired into, see *Marcy v. Marcy*, 6 Met. 360. (Note that, since this case was decided, probate courts have, by St. 1862, c. 68, s. 3, been made courts of record.) See also *Brown v. Wood*, 17 Mass. 68. — *Peters v. Peters*, 8 Cush. 529, 543, 544.

If a will be proved before a probate court in the wrong county, the probate will be void. *Holyoke v. Haskins*, 5 Pick. 20. — *Harvard College v. Gore*, 5 Pick. 370.

So in certain cases when proved before a judge of probate who is interested in the estate of the deceased, see Gen. St. c. 119, s. 4 and notes.

A probate court may itself, however, in a case of fraud or

mistake, even after the expiration of the time allowed for an appeal, revoke a decree allowing a will to probate. *Waters v. Stickney*, 12 Allen 1.

As to the conclusiveness of a decree of a probate court, allowing the will of a married woman, upon the question of her power to make the particular will so proved and to dispose of the property therein devised or bequeathed, see *Parker v. Parker*, 11 Cush. 519, 526. — *Heath v. Withington*, 6 Cush. 497, 501.

---

## TITLE IV.

OF THE SETTLEMENT OF ESTATES OF DECEASED PERSONS,  
TRUSTS, AND SPECIAL PROVISIONS RELATING TO ES-  
TATES, TRUSTS, AND GUARDIANSHIPS.

---

### CHAPTER XCIII.

OF LETTERS TESTAMENTARY AND PROCEEDINGS ON THE PROBATE  
OF WILLS.

SECT. 2. "*With sufficient surety or sureties.*" It seems that it is proper that each and all of the sureties should be bound in the same sum as the principal; but in a case in which each of two sureties was bound in only half of the full penalty in the bond, it was held that the irregularity was not such as to make the appointment of the executor and his acts as such invalid. *Baldwin v. Standish*, 7 Cush. 207, 208.

Whether the omission by an executor to give a bond according to law will invalidate his appointment as executor and all his acts as such, quære. See *Abercrombie v. Sheldon*, 8 Allen 532, 534. — *Baldwin v. Standish*, 7 Cush. 207. — *Picquet, Appellant*, 5 Pick. 65, 69.

SECT. 3. An executor who gives bond under this section

thereby conclusively admits assets in his hands, and is bound to pay the debts, legacies, &c., even though he has in fact no assets. *Colwell v. Alger*, 3 Gray 67. — *Jones v. Richardson*, 5 Met. 247, 249.

As to the liability of an executor, who has given bond under this section, to pay debts, &c., upon which suit is not brought within the time limited by Gen. St. c. 97, s. 5 for bringing suit against executors, see *Holden v. Fletcher*, 6 Cush. 235, 237, 238.

A bond given under this section cannot, after the expiration of a year and a half, the executor having been excused from filing an inventory within the three months, be cancelled or surrendered either by the probate or the supreme court. *Alger v. Coldwell*, 2 Gray 404.

SECT. 4. This section seems to adopt substantially the rule laid down in *Gore v. Brazier*, 3 Mass. 523, 542.

SECT. 5. If an executor gives a bond without sureties, without having given the notice required by this section, the statute limitation of Gen. St. c. 97, s. 5, will not begin to run from the filing of such bond. *Abercrombie v. Sheldon*, 8 Allen 532.

A notice published in a newspaper addressed "to the heirs-at-law, next of kin, and all other persons interested in the estate of" the testator, will be a sufficient notice under this section. *Wells v. Child*, 12 Allen 330, 332.

Although a minor interested in the estate has had no guardian appointed, a general notice as above will be sufficient. *Wells v. Child*, 12 Allen 330, 332.

## CHAPTER XCIV.

### OF ADMINISTRATION, AND THE DISTRIBUTION OF ESTATES OF INTESTATES.

#### *Administration.*

SECT. 1. The regularity and sufficiency of the appointment of an administrator by a probate court having jurisdiction to



appoint one on the estate, cannot be drawn in question in an action brought by the administrator against a stranger to recover a debt due to the intestate. *Emery v. Hildreth*, 2 Gray 228.

*First Clause.* “*Renounce the administration.*” Such renunciation must be recorded in the probate court, in order to be effectual. *Arnold v. Sabin*, 1 Cush. 525, 529.

“*Shall, if resident in the county, be cited,*” &c. A public notice published in a newspaper, and addressed to all persons interested, will be a sufficient citation under this clause. *Arnold v. Sabin*, 1 Cush. 525, 529.

*Second Clause.* “*If the persons so entitled are incompetent or evidently unsuitable.*” This proviso is in accordance with the decision in *Stearns v. Fiske*, 18 Pick. 24, 28.

As to what will render a person “evidently unsuitable,” see *Stearns v. Fiske*, 18 Pick. 24, 27.

“*Or if they neglect without sufficient cause for thirty days.*” That is, neglect after being duly cited as provided in the first clause of this section. *Arnold v. Sabin*, 1 Cush. 525, 528.

It seems that the court cannot grant administration to a stranger within the thirty days, at least without a prior adjudication that all the next of kin are incompetent or unsuitable. *Cobb v. Newcomb*, 19 Pick. 336.

“*To one or more of his principal creditors.*” One is a creditor within the meaning of this section, who has a cause of action against the deceased which survives. *Smith v. Sherman*, 4 Cush. 408, 412.

As to how it may be proved that the party applying is in fact a creditor, see *Arnold v. Sabin*, 1 Cush. 525, 531.

SECT. 2. Formerly an administrator was not bound to inventory real estate. *Henshaw v. Blood*, 1 Mass. 35.

SECT. 3. This section does not prevent the appointment of an administrator de bonis non after the expiration of twenty years. *Bancroft v. Andrews*, 6 Cush. 493, 495.

*Special Administration.*

SECT. 6. The appointment of a special administrator by a judge of probate, who is interested in the estate to be administered upon, is void. *Sigourney v. Sibley*, 22 Pick. 507, 508. s. c. 21 Pick. 101. See Gen. St. c. 119, s. 4 and note.

*Executors in their own Wrong.*

SECT. 15. See *Root v. Geiger*, 97 Mass. 178.

*Distribution.*

SECT. 16. *Third Clause.* The decree of distribution should specify by name the individuals entitled to share, and should fix the portion of each. *Loring v. Steineman*, 1 Met. 204, 210.

A decree of distribution made by the probate court after such notice as is prescribed by statute, or, if none is prescribed, then after such notice as it sees fit to order, is so far conclusive as to protect an administrator acting under it in good faith. *Loring v. Steineman*, 1 Met. 204, 207.

*Sixth Clause.* The sums to which a widow is entitled under this clause are to be determined as of the date of the decree of distribution. *Sullings v. Richmond*, 13 Allen 277.

It is no answer to a claim by a widow in the probate court for the distributive share in her husband's estate to which she would be entitled under this clause, that in an ante-nuptial settlement with him she covenanted not to claim any portion of his personal estate upon his decease. *Sullings v. Richmond*, 9 Allen 187. It seems, however, that in equity a widow may be compelled specifically to perform such an agreement. *Sullings v. Sullings*, 13 Allen 234.

SECT. 17. This section is in adoption of the decision in *Stearns v. Stearns*, 1 Pick. 157, 161.

## CHAPTER XCV.

## OF PUBLIC ADMINISTRATORS.

SECT. 12. This section does not prevent the probate court from decreeing a distribution of the balance of an estate, in the hands of a public administrator, among the next of kin of the intestate. *Parker v. Kückens*, 7 Allen 509.

## CHAPTER XCVI.

OF INVENTORIES, ALLOWANCES TO WIDOWS AND CHILDREN, AND  
COLLECTION OF THE EFFECTS OF DECEASED PERSONS.*Inventories.*

SECT. 1. Formerly neither executors nor administrators were required to inventory real estate. *Henshaw v. Blood*, 1 Mass. 35.

*Allowances to Widows and Children.*

SECT. 5. Regarding the purpose of the allowance to a widow, and the proper amount of it, see *Washburn v. Hale*, 10 Pick. 429, 431. — *Washburn v. Washburn*, 10 Pick. 374.

It seems that, except in the case of an allowance made by a *special administrator* under Gen. St. c. 94, s. 9, no notice of an application for an allowance to a widow or to minor children is required to be given to parties interested. *Wright v. Wright*, 13 Allen 207.

A widow who had lived separate from her husband for many years before his death, and who had considerable separate property and no children, has been held not to be entitled to an allowance under this section. *Hollenbeck v. Pixley*, 3 Gray 521.

Under an earlier statute it was held that, where the widow had been absent from home with her husband at the time of his death, and did not return immediately afterwards, she was not entitled to any allowance. *Fisk v. Cushman*, 6 Cush. 20, 28.

The right of a widow to an allowance under this section is personal in its character, and does not pass to her representatives in case of her death. Thus the death of a widow, while an appeal from the decree making her an allowance was pending, was held to put an end to the claim. *Adams v. Adams*, 10 Met. 170. So where the decree of the probate court allowed the widow certain articles to be selected by her, and she died before making the selection ;—but it seems that if she had died after making her selection and after making a demand for the articles selected, her executor or administrator might have maintained an action for the same against her husband's estate. *Drew v. Gordon*, 13 Allen 120, 122.

It seems that a widow will be entitled to her allowance, even though her husband leaves a will, the provisions of which she does not waive. *Williams v. Williams*, 5 Gray 24. (It is to be noted however that this case arose prior to St. 1854, c. 428, re-enacted in Gen. St. c. 92, s. 24.)

The court has power to make a *second* allowance to a widow at any time before the personal estate of the deceased is exhausted. *Hale v. Hale*, 1 Gray 518, 521.

Where the court allowed the widow such articles as she might choose out of her husband's personal estate to a certain amount according to the inventory, such amount being greater than the appraised value of all the personal estate then in the hands of the administrator, and the administrator afterwards sold the whole of such personal estate without her waiving her claim to her allowance, it was held that she was entitled to the whole of the proceeds of such sale. *Kingsbury v. Wilmarth*, 2 Allen 310.

*Collection of the Effects, &c.*

SECT. 6. For cases relating to the examination of executors and administrators under this provision, see *Boston v. Boylston*, 4 Mass. 318, 322.—*Higbee v. Bacon*, 7 Pick. 14.—s. c. 8 Pick. 484.

A party to whom interrogatories are put under this section

cannot avoid the effect of admissions made by him by stating independent matter in his answers. *Higbee v. Bacon*, 8 Pick. 484, 489.

The complainant may offer evidence to disprove answers given by a party interrogated under this section. *Higbee v. Bacon*, 8 Pick. 484, 489.

A bill in equity in the supreme court cannot be maintained in the cases provided for by this section. *Wilson v. Leishman*, 12 Met. 316, 320.

It seems that proceedings cannot be instituted under this section, except where the estate concerned is already under administration in the probate court. *Arnold v. Sabin*, 4 Cush. 46.

SECT. 7. The debts, to pay which the real estate of one deceased may be sold under this section, are only those debts which can be enforced at law. *Lamson v. Schutt*, 4 Allen 359.

SECT. 9. The heirs of a mortgagee, who dies before foreclosure, have not such an interest in the mortgaged premises as entitles them to enter or to bring an action for condition broken. *Smith v. Dyer*, 16 Mass. 18.

The quitclaim deeds of such heirs, if made before a decree of distribution of the mortgagee's estate, will not give the grantees sufficient title to sustain a writ of entry even against such heirs themselves. *Tuft v. Stevens*, 3 Gray 504.

After entry to foreclose, the executor or administrator of the mortgagee, who has died before foreclosure, may maintain a writ of entry against a disseisor of the mortgaged premises, or trespass against the heir of the mortgagee. *Richardson v. Hildreth*, 8 Cush. 225.—*Palmer v. Stevens*, 11 Cush. 147, 150.

SECT. 10. "*Shall be seised of the mortgaged premises in trust for the persons,*" &c. See note to next section.

SECT. 11. "*Shall be seised of such real estate in trust for the persons,*" &c. This is not a trust which is executed by the statute of uses. See *Boylston v. Carver*, 4 Mass. 598, 609.—

Baldwin v. Timmins, 3 Gray 302. — Johnson v. Bartlett, 17 Pick. 477, 484.

SECT. 12. Prior to St. 1849, c. 47, which this section re-enacts, an executor could not, even before entry to foreclose, make a valid assignment of a mortgage of real estate except by license of court. Ex parte Blair, 18 Met. 126. — Burt v. Ricker, 7 Allen 77, 78. By St. 1851, c. 288, however, all such assignments made subsequent to the Revised Statutes and prior to St. 1849, c. 47, were declared to be valid, though made without license.

*It seems* that this section is applicable only to executors and administrators appointed in this state. Cutter v. Davenport, 1 Pick. 81, 85. — Hutchins v. State Bank, 12 Met. 421, 424.

As to the right of an executor to make a conditional assignment of a mortgage, see Burt v. Ricker, 7 Allen 77.

SECT. 13. If an executor or administrator sells without license as provided in this section, his deed will not be *void*, but only *voidable* by the next of kin, legatees, or creditors of the deceased. Baldwin v. Timmins, 3 Gray 302, 304. — Thomas v. Le Baron, 10 Met. 403, 407.

“*After the right of redemption is foreclosed.*” When an executor or administrator obtains a release of the equity of redemption of a mortgage held by him, a license to sell the mortgaged estate will be equally as necessary as if the mortgage had been foreclosed by entry and three years’ possession. Johnson v. Bartlett, 17 Pick. 477, 486, 487.

## CHAPTER XCVII.

### OF THE PAYMENT OF DEBTS AND LEGACIES.

As a general rule, an executor or administrator is only required to pay, and only justified in paying, *legal demands* against the estate which he represents. But it is to some extent true that he will be allowed in his account for the payment,

made in good faith, of any claim which could be supported by any proceeding either at law or in equity. *Phillips v. Frye*, 14 Allen 36, 38. — *Ripley v. Sampson*, 10 Pick. 371, 373.

It would seem that in the payment of debts by an executor or administrator, *interest* should be paid to the day of payment, and that even if the debt did not bear interest before, interest should be allowed after the death of the testator or intestate. See *Williams v. American Bank*, 4 Met. 317.

SECT. 1. If an *executor* gives a notice as *administrator*, the notice will not for that reason be void. *Finney v. Barnes*, 97 Mass. 401.

SECT. 2. If an affidavit is not filed pursuant to this section, the giving of the notice may be proved by oral evidence. *Henry v. Esty*, 13 Gray 336.

SECT. 4. As to the liability which an executor, &c., will incur by omitting to give due notice of his appointment, see *Forward v. Forward*, 6 Allen 498.

SECT. 5. Where a claim has been cut off by this section, the supreme court may give relief in equity, if justice and equity require it, and the claimant is not chargeable with culpable neglect. St. 1861, c. 174, s. 2. — St. 1863, c. 235.

As to the application of this section to an executor, who is residuary legatee, and who gives bond under Gen. St. c. 93, s. 3, to pay all debts and legacies of the testator, see *Holden v. Fletcher*, 6 Cush. 235, 237, 238.

It is the duty of an executor or administrator to plead this statute of limitation in bar of any action brought against him after the time prescribed. *Lamson v. Schutt*, 4 Allen 359, 360. But it seems that there is no such duty to plead the general statute of limitations. *Emerson v. Thompson*, 16 Mass. 429, 431. — *Foster v. Starkey*, 12 Cush. 324, 327.

This section does not limit the time within which the administrator of a deceased defendant shall be cited in to defend the action. *Bank of Brighton v. Russell*, 13 Allen 221.

An executor or administrator may plead this statute of limi-

tation in answer to claims in set-off filed after the expiration of the two years. *Lowell v. Nelson*, 11 Allen 101, 102.

*"From the time of his giving bonds," &c.* Where a bond was given and approved by the judge of probate on a day prior to that on which the will was proved and the letters testamentary issued, on which latter day the bond was filed in the probate office, it was held that such latter day was the time of giving bond within the meaning of this section. *Wells v. Child*, 12 Allen 330, 333.

If a bond without sureties be given without the notice to creditors, &c., required by Gen. St. c. 93, s. 5, the two years' limitation provided for by this section will not begin to run. *Abercrombie v. Sheldon*, 8 Allen 532.

SECT. 6. This section was enacted in adoption of the rule laid down in *White v. Swain*, 3 Pick. 365. See also, as to the earlier law, *Johnson v. Libby*, 15 Mass. 140.

*"When assets come to the hands of an executor," &c.* The assets here referred to are new assets for which the executor or administrator has not been previously liable, not those which merely come into his hands in a new shape, as by the payment of a note which had been inventoried, or from the sale of real estate for the payment of debts. *Sturtevant v. Sturtevant*, 4 Allen 122, 124. — *Chenery v. Webster*, 8 Allen 76. — *Veazie v. Marrett*, 6 Allen 372. — *Bradford v. Forbes*, 9 Allen 365, 368.

SECT. 18. *"He shall be discharged upon proving such payments."* It seems that mere proof of the fact of such payments will not be sufficient, but that the executor must have filed an inventory, and settled an account in the probate court showing such fact. *Cushing v. Field*, 9 Met. 180. See also section 20.

SECT. 19. *"That the remainder is insufficient," &c.* If however there is either real or personal estate which can be made applicable to the payment of debts, the executor will be liable to an action upon a demand such as is here referred to. *Hildreth v. Marshall*, 7 Gray 167, 169.



*"But the creditors of the deceased, who have been previously paid, shall not be liable to refund," &c.* This applies whether such creditors have been paid in full, or only in part. *Colegrove v. Robinson*, 11 Met. 238, 240.

This proviso applies only to creditors who have been paid after the expiration of the year from the appointment of the executor. If however an administrator *within the year* pays a debt of his intestate, he may, if the estate afterwards proves insolvent, recover back the excess of the sum so paid over the amount finally allowed such creditor. *Heard v. Drake*, 4 Gray 514, 516. — *Richards v. Nightingale*, 9 Allen 149.

SECT. 22. "The question to whom and at what time a legacy or distributive portion under a will is to be paid by an executor, is one of which the judge of probate has no jurisdiction." Per SHAW, C. J., in *Cowdin v. Perry*, 11 Pick. 503, 511. "Executors must see at their peril that they pay legacies to persons legally authorized to receive them, and a literal compliance with the directions of the will is not in all cases sufficient." Per SHAW, C. J. *Newcomb v. Williams*, 9 Met. 525, 535.

Under this section an action of contract will lie for a *specific* legacy. *Colwell v. Alger*, 5 Gray 67.

An action for a legacy will not lie until after a demand by the legatee upon the executor. *Brooks v. Lynde*, 7 Allen 64, 68. — *Miles v. Boyden*, 3 Pick. 213, 218.

It seems that there is no limitation of the time within which an action to recover a legacy may be brought. *Brooks v. Lynde*, 7 Allen 64, 66.

It seems that an action for a legacy will lie against an executor after the expiration of one year from his appointment, but not sooner. *Brooks v. Lynde*, 7 Allen 64, 67. — *Howland v. Howland*, 11 Gray 469, 476. — *Pollard v. Pollard*, 1 Allen 490, 491. See also section 21. As to annuities, see section 24, last clause.

SECT. 23. See *Lovering v. Minot*, 9 Cush. 151, 157.

SECT. 24. There is nothing in this section which, when a tax is assessed during the life of A. upon property to the income of which he is entitled, can authorize its apportionment in case of his death within the year for which the tax is laid. *Holmes v. Taber*, 9 Allen 246, 248.

Dividends from the profits of incorporated companies, not declared at the time when the death or contingent event happens, are not apportionable under this section. *Granger v. Bassett*, 98 Mass. 462, 469.

SECT. 26, 27. See *Willey v. Thompson*, 9 Met. 329, 336.

SECT. 28. At common law, upon the death of one of two joint promisors the survivor alone was liable to an action upon the contract, and the executor or administrator of the deceased party could not be sued thereon. This rule was first altered in this state by St. 1799, c. 57, re-enacted in this section. *Rice, Appellant*, 7 Allen 112, 114. — *Burnside v. Merrick*, 4 Met. 537, 544. — *Foster v. Hooper*, 2 Mass. 572. But this section does not alter the old rule so far as it rendered the survivor *severally* liable on the joint contract after the death of his joint promisor, and it seems, consequently, that an action cannot be maintained against such survivor jointly with the executor or administrator of the deceased party. *Rice, Appellant*, 7 Allen 112, 115.

This section gives a creditor, in the case of the decease of one of two joint debtors, such a clear and adequate remedy at law against the estate of the deceased that he is not entitled to a remedy by bill in equity. *Curtis v. Mansfield*, 4 Met. 152, 154. But if the debt be one due from *partners*, a bill in equity will be maintainable for the purpose of applying the *real* estate of a deceased partner to the payment of a partnership debt. *Burnside v. Merrick*, 11 Cush. 537, 544.

## CHAPTER XCVIII.

## OF THE ACCOUNTS AND SETTLEMENTS OF EXECUTORS AND ADMINISTRATORS.

Payments by an executor to residuary legatees of their shares of the residue are not properly allowable in his accounts; the settlement of his accounts "should determine the amount of residue subject to distribution, but not the rights or shares of those who are entitled." *Granger v. Bassett*, 98 Mass. 462, 469.

SECT. 5. See notes to chapter 96, sect. 12.

SECT. 8. The heirs of one deceased are entitled to the rents and profits of his real estate until it is sold for the payment of his debts. *Gibson v. Farley*, 16 Mass. 280. — *Lobdell v. Hayes*, 12 Gray 236. The executor or administrator may, however, receive such rents and profits by the consent of the heirs, in which case he will be liable to account for them as provided in this section. *Stearns v. Stearns*, 1 Pick. 157, 158. — *Edwards v. Ela*, 5 Allen 91. — *Adams v. Palmer*, 6 Gray 338, 339.

When an executor or administrator is chargeable with profits under this section, he will also be allowed for reasonable expenditures in the care of the real estate. *Edwards v. Ela*, 5 Allen 87, 90.

If a party in possession of the real estate of the deceased be not only an executor or administrator, but also an heir or devisee of the deceased, his possession will be presumed to have been in the latter capacity. *Newcomb v. Stebbins*, 9 Met. 540, 545.

An executor is not chargeable with rents and profits of real estate situated in another state. *Morrill v. Morrill*, 1 Allen 132.

SECT. 9. "*And he may be examined on oath,*" &c. See *Sigourney v. Wetherell*, 6 Met. 553, 558.

SECT. 10. "*Reasonable expenses.*" "Executors, who are

obliged to employ counsel in the settlement of their accounts, shall be allowed to charge to the estate the reasonable *fees of counsel.*" *Forward v. Forward*, 6 Allen 494, 497.

As to costs recovered against an executor or administrator, see section 13.

SECT. 12. As to the reopening of accounts in cases of fraud, see *Jennison v. Hapgood*, 7 Pick. 1, 7. — *Davis v. Cowdin*, 20 Pick. 510, 512.

"*All his former accounts may be so far opened.*" This refers only to former accounts in the course of settlement of the same estate, and not to accounts relating to other estates, although the same person may be executor or administrator, and although the property of one be derived from the other. *Granger v. Bassett*, 98 Mass. 462, 467.

"*Except that any matter in dispute between two parties which had been previously heard and determined,*" &c. See *Wiggin v. Swett*, 6 Met. 194, 198.

SECT. 13. "*The amount paid by him thereupon shall be allowed.*" The payment of the amount is a condition precedent to its allowance. *Thacher v. Dunham*, 5 Gray 26.

## CHAPTER XCIX.

### OF INSOLVENT ESTATES.

For a case in which it was held that money paid to a deceased insolvent, having been kept distinct from his general funds, was not to be included in the general assets to be divided pro rata among the creditors, but might be recovered of the administrator in full, see *Cunningham v. Munroe*, 15 Gray 471, 478.

SECT. 1. If a creditor of the deceased hold security of less value than the amount of his debt, he can prove his claim only for the difference between the amount of the debt and the value of the security. *Amory v. Francis*, 16 Mass. 308. — *Haverhill Loan & Fund Ass. v. Cronin*, 4 Allen 141. — *Middlesex Bank*

*v. Minot*, 4 Met. 325. If he prove the whole claim, and receive a dividend thereon, he will be held to have waived his security. *Hooker v. Olmstead*, 6 Pick. 481.

A debt, which is not contingent, may be proved although not payable till a later day. *Haverhill Loan & Fund Ass.* 4 Allen 141, 144.

SECT. 2. When a commissioner dies, resigns, neglects to make return, or is removed, the probate court may fill the vacancy, &c. St. 1868, c. 327, s. 1. [St. 1863, c. 217, s. 2, repealed by St. 1868, c. 327, s. 3.]

SECT. 4. "*The court may allow such further time,*" &c. Such allowance may be made even after a report of the commissioners has been made and accepted. *Walker v. Lyman*, 6 Pick. 458, 460.

"*Not exceeding eighteen months.*" In case of pendency of an appeal a further time may be allowed. St. 1863, c. 217, s. 1.

"*Shall make their return.*" It seems that, as a general rule, commissioners of insolvency in making their return may reckon interest to the date of the death of the deceased debtor, or to the date of their return; but the creditors will be entitled, if the estate proves to be sufficient, to interest to the date of the decree of distribution, and even those claims which did not bear interest before the death of the debtor are to be allowed it after that time. *Williams v. American Bank*, 4 Met. 317.

SECT. 5. "*Is liable as a surety for the deceased.*" This does not apply to all cases of sureties, but only to those where the holder of the debt cannot, or from some cause does not, prove his debt under the commission, or where the surety cannot, before the close of the commission, make the debt his own by payment. *Cummings v. Thompson*, 7 Met. 132, 134.

"*Or any other contingent claim.*" As to the meaning of "contingent," see *Sears v. Wills*, 7 Allen 430.

SECT. 8. Any heir, legatee, devisee, or creditor may appeal. St. 1865, c. 258.

"*Be determined at common law.*" See *Waters v. Randall*, 8 Met. 132.

SECT. 11. Arbitrators appointed under this section have no power to award that the claimant is in fact indebted to the estate. *Gilmore v. Hubbard*, 12 Cush. 220.

SECT. 13. "*For other cause than his own neglect.*" See *Cross v. Cross*, 7 Met. 211.

SECT. 17. Dividends may be ordered whenever the court deems it proper, &c. St. 1868, c. 327, s. 2.

SECT. 18. Before the General Statutes, no distinction was made between partnership and individual creditors, in the settlement of the estate of a deceased insolvent. *Jewett v. Phillips*, 5 Allen 150, 151. — *Sparhawk v. Russell*, 10 Met. 305.

SECT. 20. "*Or the action may be continued without costs until it appears whether the estate is insolvent.*" See *Hunt v. Whitney*, 4 Mass. 620, 624. — *Blossom v. Goodwin*, 1 Mass. 502.

If an administrator suffers judgment to be recovered against him before he represents the estate of his intestate to be insolvent, he must pay the full amount of such judgment. *Newcomb v. Goss*, 1 Met. 333.

SECT. 21. "*Unless further assets,*" &c. See *Ostrom v. Curtis*, 1 Cush. 461, 466. — *Johnson v. Libby*, 15 Mass. 140, 142.

There is no statute of limitation which bars the claim of a creditor by reason of any lapse of time between the closing of the commission of insolvency and the coming to hand of further assets. *Ostrom v. Curtis*, 1 Cush. 461, 467. But see *Johnson v. Libby*, 15 Mass. 140, 143.

SECT. 26. An executor or administrator will be liable to an action under this section for neglecting to render his account, even though he has not been cited for that purpose by the judge of probate. *Fay v. Haven*, 3 Met. 109, 112.

SECT. 27. Provision for distribution of dividends unclaimed for five years. St. 1868, c. 288.

## CHAPTER C.

## OF TRUSTS.

SECT. 1. This section does not apply to trustees for public and permanent charities. *Drury v. Natick*, 10 Allen 169, 176. — *Lowell*, Appellant, 22 Pick. 215.

SECT. 2. "*Has so ordered or requested.*" *It seems* that it is not necessary that such order or request should be made in express terms,—it is sufficient if it may fairly be inferred from the provisions of the will that the testator intended that no bond should be required. *Lowell*, Appellant, 22 Pick. 215, 221.

SECT. 5. "A mere abandonment of a trust by one trustee does not divest his legal interest in the trust property and transfer it to the other trustees." Per METCALF, J., in *Webster v. Vandeventer*, 6 Gray 428, 429.

SECT. 8. As to the power of the supreme court to remove a trustee under its general equity jurisdiction, see *Bowditch v. Banuelos*, 1 Gray 220, 229.

"*Evidently unsuitable.*" See cases cited under chapter 101, sect. 2, and chapter 109, sect. 24.

SECT. 9. As to the power of the supreme court in the matter of the appointment of new trustees under its general equity jurisdiction, see *Bowditch v. Banuelos*, 1 Gray 220, 229.

It seems that not only when a sole trustee, but also when one of several dies, &c., it is the duty of the court to appoint a successor, and to keep up the original number of the trustees appointed in the will. *Dixon v. Homer*, 12 Cush. 41. — *Mass. Gen. Hospital v. Amory*, 12 Pick. 445. But although the court appoints only one trustee when it ought to have appointed more, this fact will not affect the validity of the appointment and of the acts of the trustee. *Greene v. Borland*, 4 Met. 336. — *Dixon v. Homer*, 12 Cush. 41, 43.

*"If no adequate provision is made therein."* See *Shaw v. Paine*, 12 Allen 293, 297.

*"After notice to all persons interested."* Such notice is necessary to the validity of the appointment. *Shaw v. Paine*, 12 Allen 293, 295.

One who is a devisee or legatee under the same will which creates a trust, but has no interest, direct or indirect, in the trust itself, is not entitled to notice as a "person interested." *Greene v. Borland*, 4 Met. 330, 332.

*"The trust estate shall vest in him."* It will so vest without any conveyance. *Parker v. Converse*, 5 Gray 336, 341. But when a new trustee is appointed, not by the court under this section, but in pursuance of provisions in the will, the trust estate will not vest in him without proper conveyance. *Peabody v. Eastern Methodist Soc. in Lynn*, 5 Allen 540. — *Webster v. Vandeventer*, 6 Gray 428, 429.

SECT. 11. *"In all cases* not otherwise provided for by law trustees appointed by the probate court shall be required to give bond," &c. St. 1869, c. 357.

SECT. 14. *"After notice to all other persons interested."* Further provision as to notice. St. 1864, c. 168, s. 2. [St. 1863, c. 25.]

SECT. 15. Similar provision for sale of estates encumbered by contingent remainders, executory devises, or powers of appointment. St. 1868, c. 287.

Concurrent jurisdiction over matters relating to sales under this section given to probate courts. St. 1869, c. 331.

SECT. 16. Concurrent jurisdiction of matters relative to sales of trust estates given to probate courts. St. 1869, c. 331.

Supreme court may decree sale of trust estate "upon petition of a trustee or other party interested." St. 1864, c. 168, s. 1.

Provision for notice, &c., when parties not in being, &c., are interested. St. 1864, c. 168, s. 2. [St. 1863, c. 25.]



For a case in which the court refused to decree a sale, for the reason that it would tend to defeat some of the objects of the trust, see *Davis, Petitioner*, 14 Allen 24, 29.

SECT. 19. "*No trust concerning lands.*" It seems that a trust concerning a *mortgage of real estate* is not within this section, and may be created orally, for the reason that the debt secured by the mortgage is considered the principal thing, and the security as merely the accessory. *Sturtevant v. Jacques*, 14 Allen 523, 527.

"*Except such as may arise by implication of law.*" Such a trust, for the benefit of the partnership creditors, arises when real estate is purchased by partners with partnership funds and for partnership purposes. *Fall River Whaling Co. v. Borden*, 10 Cush. 458, 471, 475. — *Burnside v. Merrick*, 4 Met. 537, 541.

Such a trust arises also when a deed is made to one, the consideration being paid by another, the nominal grantee in such case being considered to hold as trustee for the party who pays the consideration. *Livermore v. Aldrich*, 5 Cush. 431, 435. — *Perkins v. Nichols*, 11 Allen 542, 545. And it seems that the result will be the same when the grantee named in the deed pays the consideration in his own money, if it be fully and clearly proved by parole that it had been distinctly agreed before the purchase that the money so paid should be considered as a loan from such grantee to a third person. *Kendall v. Mann*, 11 Allen 15. See also *Barnard v. Jewett*, 97 Mass. 87.

But the fact that a conveyance is entirely without consideration will not, though aided by a parole agreement, raise an implied trust in the grantee in favor of the grantor. *Titcomb v. Morrill*, 10 Allen 15.

"*Unless by an instrument in writing signed,*" &c. See *Fall River Whaling Co. v. Borden*, 10 Cush. 458, 471, 475.

## CHAPTER CI.

SPECIAL PROVISIONS RELATING TO ESTATES, TRUSTS, AND  
GUARDIANSHIPS.

Executors, administrators, guardians, and trustees required to make annual returns of stocks held by them, &c., to the state tax commissioner. St. 1865, c. 283, s. 2, 14. [St. 1864, s. 4, 13.]

Probate courts may authorize trustees and guardians to *mortgage* real estate under their control or management, for the purpose of paying sums assessed thereon for betterments or the expense of repairs and improvements thereon made necessary by such betterments. St. 1869, c. 451.

Administrators and guardians of spendthrifts and insane persons may be authorized to *mortgage* the real estate of their intestates or wards. St. 1864, c. 212.

Probate courts may authorize executors, administrators, guardians, or trustees to sell and convey or release *lots in cemeteries*. St. 1869, c. 35.

Probate courts may authorize sale of "wood and timber standing on land held in dower, or on land the use and improvement of which belongs for life or otherwise to any person other than the owner of the fee therein." St. 1869, c. 249.

*Death, Removal, &c., of Executor, &c.*

SECT. 1. "*To some suitable person.*" This gives the judge of probate discretionary authority to grant letters of administration to any suitable person, and the next of kin have no right to claim such letters as in the case of an original grant of administration. *Russell v. Hoar*, 3 Met. 187, 190.

SECT. 2. "*Evidently unsuitable therefor.*" As to what constitutes an "evident unsuitableness," see *Hussey v. Coffin*, 1 Allen 354, 356. — *Thayer v. Homer*, 11 Met. 104, 110. —

Drake v. Green, 10 Allen 124. — Winship v. Bass, 12 Mass. 198.

SECT. 4. For cases arising under earlier statutes, see Wiggins v. Swett, 6 Met. 195, 196. — Newell v. Marcy, 17 Mass. 341. — Swan v. Wilkinson, 14 Mass. 295.

An administrator de bonis non, appointed under this section upon the marriage of a sole executrix or administratrix, may prosecute a suit brought by such sole executrix or administratrix, and pending at the time of his appointment. Brown v. Pendergast, 7 Allen 427.

*"The marriage shall operate as an extinguishment of her authority."* The law altered in this respect, — marriage not to have this effect, provided, &c. St. 1869, c. 409, s. 2.

SECT. 5. Independent of this statute an executor or administrator could not resign his trust. Sears v. Dillingham, 12 Mass. 358.

*"To some suitable person."* See note to these words in section 1.

*Accounts, Discharges, Compromises, Releases.*

A guardian cannot be allowed to charge in his account for damages caused to his own property by the tort of his ward. Brown v. Howe, 9 Gray 84.

SECT. 8. Provision for distribution of moneys not claimed for five years after they become payable, the person entitled not having been heard from for fourteen years. St. 1868, c. 288.

Executors, administrators, and trustees may pay over to guardians of persons residing out of the state. St. 1866, c. 122, s. 2.

SECT. 10. Administrators may at common law submit matters to arbitration, and this power is not affected by this statute. Chadbourn v. Chadbourn, 9 Allen 173.

Supreme court may authorize executors, administrators, guardians, and trustees to adjust by arbitration or compromise controversies between claimants to estate in their hands, &c. St. 1861, c. 174, s. 1.

Supreme court may authorize persons *named as executors* in any instrument purporting to be a will to compromise, &c., between devisees, &c., and heirs, &c. St. 1864, c. 173. — St. 1865, c. 186.

SECT. 11. This section amended by adding thereto the following words: "Provided, that in all cases notice shall be given in the same manner as now prescribed by law in relation to applications for sales of real estate by the same parties under license from the probate court." St. 1863, c. 230.

*Bonds.*

SECT. 12. "*Shall be inhabitants of this state.*" If there are on a bond two sureties who are inhabitants of this state and a third who is not, such bond, having been duly approved by the judge of probate, will be valid. *Clarke v. Chapin*, 7 Allen 425.

As to the time when the bond may be approved by the judge of probate, see *Wells v. Child*, 12 Allen 330, 332.

It seems that several bonds, with a single surety each, may be given instead of one bond with joint sureties. *Loring v. Bacon*, 3 Cush. 465, 467.

SECT. 18. It seems that the sureties on the prior bond will not be liable for breaches committed after the approval of a new bond given under section 15 or 16. *Loring v. Bacon*, 3 Cush. 465, 468.

SECT. 19. The three cases mentioned in this and the two following sections are the only ones in which a person may sue a probate bond for his own benefit without application to the judge of probate, — consequently a legatee cannot bring such suit. *Newcomb v. Williams*, 9 Met. 525, 536. — *Fay v. Taylor*, 2 Gray 154, 158. — *Robbins v. Hayward*, 16 Mass. 524.

A creditor may maintain a suit under this section although the estate is insolvent, provided he has obtained judgment before it has been represented to be so. *Newcomb v. Goss*, 1 Met. 333.

*"Upon demand made."* As to the nature of the demand required, see *Heard v. Lodge*, 20 Pick. 53, 60.

Such demand may be made in behalf of the creditor by the attorney of record by whose agency the judgment against the executor or administrator has been recovered. So also a demand by one of several joint creditors will be sufficient. *Heard v. Lodge*, 20 Pick. 53, 59.

SECT. 20. *"When the amount due to him has been ascertained by the decree of distribution."* As to the remedy of a creditor when there has been no such decree by reason of the failure of the administrator to render his account, see *Barton v. White*, 21 Pick. 58, 61.

SECT. 22. As to the general theory and course of proceedings under this and the following sections, see *Newcomb v. Williams*, 9 Met. 525, 537.

*"Has failed to perform his duty," &c.* When an administrator had failed to account within the year, but had subsequently rendered an account which had been allowed at the request of all parties in interest, it was held that no action would lie upon his bond. *Loring v. Kendall*, 1 Gray 305, 314.

*"The court may authorize," &c.* Such authority can only be granted by decree in writing. *Fay v. Rogers*, 2 Gray 175.

No notice of application is required to be given by the court to the executor or administrator before such authority is granted. *Richardson v. Oakman*, 15 Gray 57, 58.

*"Or other person aggrieved."* Whether a devisee of real estate is such a person, quære. *Stevens v. Cole*, 7 Cush. 467, 470.

As to the remedy of the administrator of an executor, to whom at the time of his death a balance was due from the estate of his testator, see *Munroe v. Holmes*, 13 Allen 109. — s. c. 9 Allen 244.

SECT. 25. *"When the action is brought for the benefit of*

any persons as creditors, &c., there shall be a further indorsement," &c. Such further indorsement is required only in the cases specified in sections 19, 20, 21, and if such indorsement be made in a case under section 22 it will be proper that the court should order it to be annulled and stricken from the writ. *Bennett v. Russell*, 2 Allen 537, 538.

SECT. 28. *Seventh Clause*. "*Shall be considered as the judgment creditor.*" See *Follansbee v. Bird*, 8 Cush. 289, 291.

SECT. 29. See *Newcomb v. Williams*, 9 Met. 525, 537, 538.

*Liability of Heirs, &c., for Debts of Deceased.*

SECT. 31. "*After the settlement of an estate,*" &c. Before the time for granting administration has expired, the heirs are not liable merely for the reason that no administration has been taken out. *Roger v. Burrell*, 12 Mass. 395.

"*The heirs.*" As to the liability of the husband of an heir, see *Bates v. Norcross*, 17 Pick. 14, 21. — *Howes v. Bigelow*, 13 Mass. 384, 390.

"*All debts which could not have been sued for against the executor,*" &c. A judgment obtained against the estate in another state, in which ancillary administration upon it has been taken out, is not such a debt, although recovered subsequently to the expiration of the time limited for bringing actions in this state. *Low v. Bartlett*, 8 Allen 259, 266.

SECT. 32. The declaration in an action under this section must allege sufficient facts to bring the case strictly within the provisions of the statute. *Hall v. Bumstead*, 20 Pick. 2.

"*To an amount not exceeding the value of the real or personal estate that he has derived from the deceased.*" Such real estate includes only that situated in this state. *Austin v. Gage*, 9 Mass. 395.

SECT. 33. When an heir dies while the suit against him is pending, his executor or administrator should be summoned in to defend it. *Wood v. Leland*, 1 Met. 387, 389.

SECT. 34. A suit in equity may be maintained in the cases provided for in this section, although the creditor may have a remedy at law. *Wood v. Leland*, 22 Pick. 503, 506.

See a case in which it was held that the claimant could not maintain his bill in equity by reason of delay and laches, although not strictly barred by any statute of limitation. *Phillips v. Rogers*, 12 Met. 405, 410.

When a suit in equity is maintained under this section, not against all the persons liable, but only against "as many of them as are within the reach of process," the claimant will be entitled to recover his whole claim from those who are summoned, without allowing for the absent parties. *Wood v. Leland*, 1 Met. 387, 389.

For a decision relative to the form of a bill in equity brought under this section, see *Fairfield v. Fairfield*, 15 Gray 596.

SECT. 37. See *Brigden v. Cheever*, 10 Mass. 450.

*Estates of Persons not Inhabitants of this State.*

SECT. 38. When a foreign executor or administrator takes out ancillary administration in this state, he will not be liable on his bond in this state for the disposition of the effects received in the state in which the original administration was granted. *Fay v. Haven*, 3 Met. 109. See also *Hooker v. Olmstead*, 6 Pick. 481.

See also, on the subject of this section, *Stevens v. Gaylord*, 11 Mass. 256. — *Dawes v. Boylston*, 9 Mass. 337, 355.

SECT. 40. For cases arising under this section, see *Davis v. Estey*, 8 Pick. 475. — *Dawes v. Head*, 3 Pick. 128.

## TITLE V.

OF TITLE TO REAL PROPERTY BY SPECIAL PROVISIONS  
OF LAW.

## CHAPTER CII.

OF SALES OF LANDS BY EXECUTORS, ADMINISTRATORS, AND  
GUARDIANS.*Sales by Executors and Administrators.*

THE heirs-at-law of one deceased are entitled to the rents and profits of his undivided real estate until it is lawfully sold for the payment of his debts, even although the estate is insolvent. *Lobdell v. Hayes*, 12 Gray 236. — *Gibson v. Farley*, 16 Mass. 280.

SECT. 1. It seems that under this section the reversion expectant after the death of the widow of the deceased may be sold. While St. 1784, c. 2, was in force (i.e., until the Revised Statutes of 1836), such reversion could only be sold upon special application to the judge of probate. *Bancroft v. Andrews*, 6 Cush. 493, 496. Prior to the St. 1784, however, no such special application was necessary. *Leverett v. Armstrong*, 15 Mass. 26, 28.

SECT. 2. When an administrator was licensed to sell so much real estate as would amount to \$640, and he sold the whole, which consisted of several parcels, for \$953.33, it was held that the whole sale was void. *Litchfield v. Cudworth*, 15 Pick. 23, 31.

The court is not restricted to the granting of a license to sell to the exact amount, neither less nor more, which the petitioner may represent to be necessary. *Tenney v. Poor*, 14 Gray 500, 502.

When the representation of the executor or administrator is that it is necessary to sell the whole of the real estate, and it



is so proved to the satisfaction of the court, it need not grant a license in terms to sell so much as may be necessary, &c., but may grant one for the sale of the whole. *Sewall v. Raymond*, 7 Met. 454.

*"If it is necessary to sell only part, &c., he may also set forth the value, &c., and the court may direct," &c.* These provisions are not imperative; the executor or administrator is not obliged to set forth the value, &c., nor is the court required to direct what specific part shall be sold, but may order a sale of so much, &c. *Yeomans v. Brown*, 8 Met. 51, 57. — *Norton v. Norton*, 5 Cush. 524, 527.

SECT. 4. As to the proper form of petition, license, &c., under this section, see *Verry v. McClellan*, 6 Gray 535. — *Tenney v. Poor*, 14 Gray 500, 502.

SECT. 5. It seems that the supreme court or superior court has discretionary power to grant or refuse a license, notwithstanding the certificate of the probate court. *Allen, Petitioner*, 15 Mass. 58, 60.

SECT. 6. *"Is licensed to sell more than is necessary."* See *Sewall v. Raymond*, 7 Met. 454, 459.

Unless authorized to sell more than is necessary, &c., an executor or administrator is not required to give special bond. *Tenney v. Poor*, 14 Gray 500, 502. — *Fay v. Valentine*, 8 Pick. 526.

SECT. 7. See *Lee, Appellant*, 18 Pick. 285. — *Hays v. Jackson*, 6 Mass. 149.

SECT. 8. (By St. 1864, c. 265, certain notices were required to be sent by mail, but by St. 1865, c. 254, that act was repealed, and it was provided that "no right, title, or proceeding shall be affected by reason of any failure or omission heretofore to comply with the requirements thereof.")

As to what is sufficient evidence that the notice required by this section has been given, see *Thomas v. Le Baron*, 8 Met. 355, 362.

*"All persons interested."* The wife of a devisee of the real estate referred to in the petition, is not entitled to notice as a

person interested. *Harrington v. Harrington*, 13 Gray 513. Nor is a disseisor of such real estate. *Yeomans v. Brown*, 8 Met. 51, 57.

It is not necessary that guardians should be appointed for all minors interested in the estate. *Holmes v. Beal*, 9 Cush. 223, 226.

*"Three weeks successively."* A publication in three successive weeks will be sufficient, although there is not an interval of a week between either the first and second, or the second and third publications. *Bachelor v. Bachelor*, 1 Mass. 256.

*"Show cause why the same should not be granted."* It seems that they show such cause, if they furnish funds for the payment of the debts, to pay which the sale is asked for. *Fay v. Taylor*, 2 Gray 154, 160.

SECT. 9. *"That shall eventually be found due," &c.* That is, by an account settled in the probate office. *Studley v. Josselyn*, 5 Allen 118.

*"Shall be insufficient therefor."* Such insufficiency must be shown by the executor's or administrator's account, rendered on oath, and allowed in the probate court. *Studley v. Josselyn*, 5 Allen 118, 120.

SECT. 10. *"If the facts set forth in the petition are proved."* The admission of the executor or administrator is not sufficient proof of the existence of a debt. *Chamberlin v. Chamberlin*, 4 Allen 184, 186.

SECT. 11. *"Lands fraudulently conveyed by the deceased."* See *Norton v. Norton*, 5 Cush. 524, 528.

When real estate of the deceased is sold under this section, as having been conveyed by him in fraud of certain creditors, not those creditors only, but all the creditors of the deceased, will be entitled to share in the proceeds. *Norton v. Norton*, 5 Cush. 524, 530.

As to the sale of an estate to which the deceased had title only as disseisor, his possession not having continued for twenty years, see *Peele v. Chever*, 8 Allen 89.

SECT. 12. An action may be brought under this section before the other real estate of the deceased has been sold. *Tenney v. Poor*, 14 Gray 500, 503. As to the form and effect of the judgment in such action, see *Norton v. Norton*, 5 Cush. 524, 531.

SECT. 14. This provision altered by St. 1869, c. 358.

SECT. 16. If the affidavit provided for in this section be not filed, the giving of the notice may be proved aliunde by competent evidence, but no presumption will be made, within thirty years, that it was given. *Thomas v. Le Baron*, 8 Met. 355, 363.

SECT. 17. The executor or administrator may make a valid agreement to offer the estate at auction, and to sell it to a particular individual for an agreed price, provided no higher sum should be bid. But such an agreement to sell at a fixed price, without regard to the biddings, would be fraudulent and void. *Hunt v. Frost*, 4 Cush. 54.

SECT. 19. Real estate *specifically devised* will not be sold under this section for the payment of legacies. *Humes v. Wood*, 8 Pick. 478. — *Ellis v. Page*, 7 Cush. 161, 166.

*Sales of Land by Guardians.*

The legislature can specially authorize the sale of the real estate of a ward, notwithstanding they have delegated the same power to the courts. *Davison v. Johonnot*, 7 Met. 388. — *Rice v. Parkman*, 16 Mass. 326.

*For Maintenance and Investment.*

SECT. 26. Similar provision for sale of standing wood on real estate of ward. St. 1867, c. 231.

SECT. 28. As to the liability of sureties upon a bond given under this section, see *Mattoon v. Cowing*, 13 Gray 387. — *Fay v. Taylor*, 11 Met. 529. — *Brooks v. Brooks*, 11 Cush. 18, 23.

SECT. 30. As to the right of a guardian, who has been licensed to sell for investment, to apply any part of the proceeds for his ward's maintenance, see *Strong v. Moe*, 8 Allen 125.

*By Guardian of Non-resident Ward.*

When a ward removes or resides out of the state, his guardian, appointed in this state, may sell all his real estate and pay over the proceeds to any guardian, &c., appointed where the ward resides. St. 1866, c. 122.

*Provisions common to Sales by Guardians.*

The real estate of a ward, which may be sold under this chapter, does not, it seems, include that in which he has an interest only as cestui que trust. *Penniman v. Sanderson*, 13 Allen 193, 200, 202, 204.

As to the liability of a guardian where he does not make the sale according to the order of the court, see *Harding v. Larned*, 4 Allen 426.

SECT. 39. (By St. 1864, c. 265, certain notices were required to be sent by mail, but by St. 1865, c. 254, that act was repealed, and it was provided that "no right, title, or proceeding shall be affected by reason of any failure or omission heretofore to comply with the requirements thereof.")

See also cases cited under section 8 of this chapter.

*Provisions Common to Sales by Executors, Administrators, and Guardians.*

SECT. 46. "Unless it is commenced within five years next after the sale." See *Holmes v. Beal*, 9 Cush. 223, 227.

"Under legal disability to sue." A remainder-man, during the continuance of the life-estate, is under such disability. *Jewett v. Jewett*, 10 Gray 31.

SECT. 47. This section repealed and superseded by St. 1860, c. 60, which in its turn has been repealed and superseded by St. 1864, c. 137, which contains the law now in force on this subject.

## CHAPTER CIII.

## OF TAKING LAND TO SATISFY EXECUTIONS FOR DEBT.

*Levy and Set-off.*

When lands are taken on execution, which were not attached on mesne process, copy of execution to be left with clerk of court, &c. St. 1862, c. 190.

A sheriff can take upon a levy no more land than is *exactly* sufficient to satisfy the execution, and if he errs in this respect the whole levy will be void; thus, a levy of an execution for \$1,994.11 was held to be void, when the premises seized and set off were appraised at \$2,000. *Chenery v. Stevens*, 97 Mass. 77, 83.

In determining the amount due upon the execution, interest may be reckoned to the day when the levy is completed. *Bucknam v. Lothrop*, 9 Allen 147.

SECT. 1. As to the effect of a levy of an execution, by mistake, upon lands of a person other than the judgment debtor, see *Blood v. Wood*, 1 Met. 528, 534.

The judgment against the debtor, upon which lands fraudulently conveyed by him are taken on execution, is not, as against the grantee of the land, conclusive evidence that the plaintiff in the suit in which such judgment was obtained, was at the time of obtaining judgment a creditor of the defendant in that suit. *Inman v. Mead*, 97 Mass. 310, 314.

*"Or is conveyed to a third person with the intent," &c.* It is not necessary that such third person should participate in such intent. *Clark v. Chamberlain*, 13 Allen 257, 261.

As to the proper form of the officer's return, &c., in cases where land thus conveyed is levied upon, see *Clark v. Chamberlain*, 13 Allen 257, 261.

For cases arising under the earlier statutes relative to the levy of execution on lands thus conveyed to a third person, see

Livermore v. Boutelle, 11 Gray 217, 220. — Hinckley v. Phelps, 2 Allen 77, 79. — Foster v. Durant, 2 Gray 538, 540. — Howe v. Bishop, 3 Met. 26.

SECT. 3. "*Three disinterested and discreet men.*" "In requiring that they should be disinterested we do not think the legislature intended merely an exclusion of direct pecuniary interest in the result. Near affinity by blood or marriage is equally a disqualification." A son-in-law of the judgment creditor held, accordingly, not to be disinterested. Wolcott v. Ely, 2 Allen 338, 340.

Inhabitants of a town are not competent as appraisers upon the levy of an execution in favor of the town. Boston v. Tileston, 11 Mass. 468.

A judgment debtor is estopped from objecting that an appraiser was interested, if such interest was in favor of such debtor himself. Cutting v. Rockwood, 2 Pick. 443, 445.

It seems that it is not necessary that appraisers should be persons residing in the county or even in the commonwealth. Campbell v. Webster, 15 Gray 28, 30.

"*One shall be appointed by the creditor.*" When such creditor was under guardianship as a spendthrift, it was held that his guardian might appoint an appraiser in his behalf. Bond v. Bond, 2 Pick. 382, 385.

"*One by the debtor whose land is taken.*" If there are two debtors, and one of them alone appoints the appraiser, it will be sufficient, if the land to be appraised belongs to both debtors, or to the one appointing only, — otherwise, if the land belongs solely to the other debtor. Herring v. Polley, 8 Mass. 113.

"*If the debtor is absent,*" &c. See Shields v. Hastings, 10 Cush. 247. — Leonard v. Bryant, 2 Cush. 32, 37.

"*Before a justice of the peace.*" When the appraisers happen to be themselves justices, they may administer the oath to each other. So also the oath may be administered by the judgment debtor, if he be a justice. Barnard v. Fisher, 7 Mass. 71, 73.

SECT. 4. If the appraisers view the land, without going upon it, it will be sufficient. *Bond v. Bond*, 2 Pick. 382. — *Hammatt v. Bassett*, 2 Pick. 564, 565.

SECT. 5. "*Shall be described by metes and bounds, or otherwise,*" &c. The certificate may refer, for particulars of the description, to a will recorded in the registry of probate. *Allen v. Taft*, 6 Gray 552.

So it may refer to a deed which is recorded, even though it does not state that such deed is on record. *Jenks v. Ward*, 4 Met. 404, 411. — *Boylston v. Carver*, 11 Mass. 515.

So the certificate will be sufficient, although it does not state in what town the land lies, if it gives the bounds in such a way that by parol evidence the land can be identified to the satisfaction of a jury. *Chappell v. Hunt*, 8 Gray 427, 429.

But a certificate has been held to be bad, when it described the land as an undivided part of the real estate of which the father of the judgment debtor died seised, being in the towns of W. and G., referring for the description thereof to the inventory of said estate. *Tate v. Anderson*, 9 Mass. 92.

See also, as to the certainty of description required, *Bates v. Willard*, 10 Met. 63, 77.

SECT. 6. Several parcels, upon which an execution is levied, may be appraised together, although some of them are subject to a mortgage which does not cover all. *Hannum v. Tourtellott*, 10 Allen 494.

This section adopted the law as laid down in *Barnard v. Fisher*, 7 Mass. 71. — *Boylston v. Carver*, 11 Mass. 515. — *Bond v. Bond*, 2 Pick. 382.

SECT. 7. This section adopted the law as laid down in the earlier cases of *Moffitt v. Jaquins*, 2 Pick. 331. — *Barrett v. Porter*, 14 Mass. 143. — *Whitman v. Tyler*, 8 Mass. 284.

SECT. 8. If the estate of the debtor is appraised as subject to an incumbrance, when it is not in fact so subject, the levy will be void. *Root v. Colton*, 1 Met. 345, 348.

The latter clause in this section is in adoption of the decision in *Atkins v. Bean*, 14 Mass. 404.

As to the proper mode of deducting for mortgages, see section 33 of this chapter and notes thereof.

As to the proper mode of deducting for other encumbrances, see *Jenks v. Ward*, 4 Met. 404, 412.

SECT. 9. This section adopts the rule as laid down in *Bartlett v. Harlow*, 12 Mass. 348. — *Baldwin v. Whiting*, 13 Mass. 57.

SECT. 11. This section was intended to remove doubts raised in *Barber v. Root*, 12 Mass. 260, 262. — *Chapman v. Gray*, 13 Mass. 439.

SECT. 14. Rent for a *part of a term* of years cannot be set off on an execution against the reversioner. *Montague v. Gay*, 17 Mass. 439.

SECT. 16. This section adopts the decision in *Gore v. Brazier*, 3 Mass. 523, 538, 539.

SECT. 17. The execution must be returned into the clerk's office in order to complete the title of the judgment creditor, but there seems to be no particular time within which such return must be made. *Prescott v. Pettee*, 3 Pick. 331.

An execution, duly levied, is a satisfaction of the judgment, although not recorded within the three months. *McLellan v. Whitney*, 15 Mass. 137.

SECT. 21. This section applies to executions upon which the right of redeeming mortgaged lands has been sold under sections 39 and 40 of this chapter. *Perry v. Perry*, 2 Gray 326.

SECT. 22. Similar provision regarding executions issued by police courts or justices of the peace. St. 1863, c. 125.

This section applies to executions, upon which the right of redeeming mortgaged lands has been sold under sections 39 and 40 of this chapter, as well as to those levied by taking and setting off by metes and bounds. *Perry v. Perry*, 2 Gray 326. — *Dewing v. Durant*, 10 Gray 29.



*"The creditor may sue out \* \* \* a writ of scire facias," &c.* The creditor is entitled to sue out such writ as of right, and without first applying therefor by petition to the court. *Wilson v. Green*, 19 Pick. 433.

The remedy by scire facias is the *exclusive* remedy in the cases provided for in this section, and the judgment creditor cannot maintain an action of debt upon the judgment. *Dennis v. Arnold*, 12 Met. 449. — *Perry v. Perry*, 2 Gray 326, 329.

And until the levy of execution is vacated by scire facias, the judgment creditor has no demand which will authorize the commencement of proceedings in insolvency against the debtor. *Dennis v. Sayles*, 11 Met. 234, 237.

SECT. 24. *"Allow him a reasonable time to appoint an appraiser."* See *Tyler v. Smith*, 8 Met. 599, 603.

*"The levy shall be considered as made at the time when the land is taken."* See *Capen v. Doty*, 13 Allen 262, 263. — *Cushing v. Arnold*, 9 Met. 23, 26. — *Hall v. Crocker*, 8 Met. 245, 247. — *Brown v. Maine Bank*, 11 Mass. 153, 158.

Interest, however, may properly be reckoned on the execution until the day when the levy is completed. *Bucknam v. Lothrop*, 9 Allen 147. — *Taylor v. Robinson*, 2 Allen 562, 564.

SECT. 25. As to the amendment of the officer's return, see *Pratt v. Wheeler*, 6 Gray, 520, 522. — *Wolcott v. Ely*, 2 Allen 338. — *Bates v. Willard*, 10 Met. 63, 81.

This section does not enumerate *all* the matters necessary to be included in the officer's return; for instance, it must state the names of the appraisers, and that they were disinterested and discreet men. *Bradley v. Bassett*, 2 Cush. 417, 418.

Regarding the conclusiveness of the officer's return as to the truth of the facts therein stated, see *Chappell v. Hunt*, 8 Gray 427, 430. — *Campbell v. Webster*, 15 Gray 28. — *Dooley v. Wolcott*, 4 Allen 406, 408. — *Wolcott v. Ely*, 2 Allen 338, 340. — *Bates v. Willard*, 10 Met. 63, 80.

*First Clause. "The time when," &c.* It is sufficient to state the day, without the hour and minute. *Cowls v. Hast-*

ings, 9 Met. 476, 481. The statement by the sheriff that on a certain day the appraisers were sworn and appraised the estate, and he delivered seisin and possession thereof to the creditor, is a sufficient statement that the premises were taken on that day. *Childs v. Barrows*, 9 Met. 413, 416. — *Cowls v. Hastings*, 9 Met. 476, 481.

*Second Clause.* "*That the appraisers were appointed,*" &c. The names of the appraisers, and the fact that they were disinterested and discreet men, must be stated in the return. *Bradley v. Bassett*, 2 Cush. 417, 418. — *Williams v. Amory*, 14 Mass. 20. It need not be stated that the appraisers reside in the county or in the commonwealth. *Campbell v. Webster*, 15 Gray 28, 30.

"*Appointed by \* \* \* the debtor.*" A return that one of the appraisers was appointed by "A. B., attorney of the debtor," sufficiently shows an appointment by the debtor, and the return of the officer is conclusive as to the authority of such attorney. *Chappell v. Hunt*, 8 Gray 427, 430. — *Dooley v. Wolcott*, 4 Allen 406, 408. — *Bates v. Willard*, 10 Met. 63.

"*Or that the debtor was absent, &c., and the officers appointed one for him.*" It is not necessary in such case to mention which appraiser was appointed in behalf of the debtor. *Dooley v. Wolcott*, 4 Allen 406. — *Ufford v. Dickinson*, 12 Allen 543, 544.

The reason why the officer appoints an appraiser for the debtor must clearly appear in his return. *Shields v. Hastings*, 10 Cush. 247. — *Leonard v. Bryant*, 2 Cush. 82. — *Ufford v. Dickinson*, 12 Allen 543. — *Eddy v. Knap*, 2 Mass. 154. — *Whitman v. Tyler*, 8 Mass. 284.

*Third Clause.* "*That the appraisers were duly sworn,*" &c. A general statement that "the appraisers were first sworn according to law," will be sufficient. *Leonard v. Bryant*, 2 Cush. 32, 38. See also *Cowls v. Hastings*, 9 Met. 476.

The levy of an execution will not be invalidated because the return does not state any reason for a delay of a month before the appraisers were sworn. *Inman v. Mead*, 97 Mass. 310, 313.

*Fourth Clause.* “*That they appraised and set off,*” &c. This need not be alleged in terms. *Childs v. Barrows*, 9 Met. 413, 416.

*Fifth Clause.* “*Delivered seisin thereof.*” Where the officer returned that he had delivered “possession,” instead of “seisin,” it was held not to affect the validity of the return. *Boylston v. Carver*, 11 Mass. 515.

So where he returned that he had delivered seisin to an “agent,” instead of to an “attorney” of the creditor; and the authority of such agent or attorney need not be by deed. *Pratt v. Putnam*, 13 Mass. 361.

Where the judgment creditor is under guardianship as a spendthrift, the return may state that seisin was delivered to the guardian. *Bond v. Bond*, 2 Pick. 382.

*Sixth Clause.* See cases cited in note to section 5 of this chapter.

*Seventh Clause.* This clause seems to have been in adoption of the decisions in *Moffitt v. Jaquins*, 2 Pick. 330, and *Barrett v. Porter*, 14 Mass. 143. See also *Whitman v. Tyler*, 8 Mass. 28 .

SECT. 26. “*Within one year after the levy.*” That is, after “the first act of the levy.” *Capen v. Doty*, 13 Allen 262, 263. — *Houghton v. Field*, 2 Cush. 141, 144.

“*Such reasonable expenses,*” &c. It seems, that “the cost of large and expensive buildings, or similar improvements, would not be allowed.” *Norton v. Babcock*, 2 Met. 510, 518.

*Set-off, &c., of Mortgaged Lands.*

SECT. 33. “*Shall deduct the value,*” &c. The levy will be invalid if the appraisers materially overestimate the value of the encumbrance. *McGregor v. Williams*, 10 Cush. 526.

When the land levied upon is subject to a mortgage, which covers also other property, it is *proper* that only a proportionate part of the mortgage should be deducted. *Wadsworth v. Williams*, 97 Mass. 339, 341.

For early cases upon the subject of this section, see *Warren v. Childs*, 11 Mass. 222, 226. — *White v. Bond*, 16 Mass. 400, 402.

SECT. 36. See *Gleason v. Dyke*, 22 Pick. 390, 394.

*Sales, &c., of Mortgaged Lands.*

When several parcels of land are included in one mortgage, a sale on execution of the right to redeem *one* of such parcels will be invalid. Nothing can be sold less than the right to redeem *all* the premises covered by the mortgage, and the rule will be the same, though the lands lie in different counties. *Webster v. Foster*, 15 Gray 31, 34.

SECT. 39. "*All rights of redeeming mortgaged lands.*" If a mortgage on the estate of the debtor has been actually paid, although not yet due, and although the discharge has not been recorded, a sale under this section will not be valid. *Grover v. Flye*, 5 Allen 543.

But payment of the mortgage subsequently to the levy, but before the sale, will not invalidate the proceedings. *Capen v. Doty*, 13 Allen 262.

The purchaser at a sale under this section cannot deny the validity of the mortgage, the right of redeeming from which he has purchased. *Russell v. Dudley*, 3 Met. 147, 149. When, however, there are two mortgages upon the estate, the equity of redemption of which is sold, the purchaser may contest the validity of one of them. *Stebbins v. Miller*, 12 Allen 591, 596.

SECT. 40. "*A sufficient deed thereof.*" Such deed will convey no title, if the description in such deed does not correspond with that in the return upon the execution. *Whiting v. Hadley*, 3 Allen 357.

For a form of a deed under this section, see *Dow v. Lewis*, 4 Gray 468.

"*Which being recorded \* \* \* within three months,*" &c. Though not so recorded, the sheriff's deed will be good as

against a subsequent purchaser or attaching creditor, who has *actual notice* of the sale and conveyance. *Houghton v. Bartholomew*, 10 Met. 138, 142. But see *Denny v. Lincoln*, 13 Met. 200, 202.

If the deed be not recorded within the three months, it will not be valid as against a subsequent attaching creditor who has not actual or constructive notice of it. *DeWitt v. Harvey*, 4 Gray 486, 491.

SECT. 41. "*The officer shall give notice \* \* \* to the debtor.*" In case of the death of the debtor, it seems that his executor or administrator, and not his heirs, should be notified. *Atkins v. Sawyer*, 1 Pick. 351, 354.

"*And shall also cause notifications thereof to be posted up,*" &c. In such notification a general description of the property will be sufficient. *Pomeroy v. Winship*, 12 Mass. 513, 521.

SECT. 42. "*May adjourn it for any time not exceeding seven days.*" Whether Sunday is to be reckoned in counting such seven days, quære. See *Thayer v. Felt*, 4 Pick. 354. See also note to section 7 of chapter 3.

SECT. 44. "*Within one year after such sale.*" In computing such year, it seems that the day of the sale is to be excluded. *Bigelow v. Wilson*, 1 Pick. 485, 494.

SECT. 46. "*May have like remedies,*" &c. As to what those remedies are, see *Houghton v. Field*, 2 Cush. 141, 144. — *Hooker v. Hudson*, 19 Pick. 467, 469.

#### *Special Provisions.*

SECT. 48. "*The record title to which fraudulently stands in the name of,*" &c. This does not apply to a case where, an equity of redemption of mortgaged lands having been sold on execution under the provisions of this chapter, the purchaser contests the validity of one of several mortgages upon such lands. *Stebbins v. Miller*, 12 Allen 591, 597.

Under the statutes prior to the General Statutes (St. 1844, c. 107, and St. 1855, c. 453), the bringing of a suit within a year, &c., was required only in cases where real estate had

been paid for by the debtor, but the legal title retained by the vendor or conveyed to a third person, and not in cases where real estate had been fraudulently conveyed *by the debtor* to a third person. *Castle v. Palmer*, 6 Allen 401, 405.

*"The levy shall be void."* A mere wrong-doer and stranger to the title cannot avail himself of this. *Wellington v. Geary*, 3 Allen 508.

*"Commences his suit."* A writ of entry is the proper form of action. *Clark v. Chamberlain*, 18 Allen 257, 260.

A petition for partition is not a proper process for this purpose. *Newton Bank v. Hull*, 10 Allen 144.

SECT. 49. Interest on the judgment, to the time when the levy is completed, may be added to the execution in addition to the fees and charges here specified. *Taylor v. Robinson*, 2 Allen 562, 564. — *Bucknam v. Lothrop*, 9 Allen 147.

SECT. 51. As to the law on this subject prior to the Revised Statutes, see *Kelley v. Beers*, 12 Mass. 387. — *Reed v. Bigelow*, 5 Pick. 281, 283.

SECT. 53. *It seems* that the real estate of one deceased may be taken as provided in this section, even although it has passed from his devisee or heir to a bona fide purchaser. *Gore v. Brazier*, 3 Mass. 523, 541.

SECT. 55. This section seems to be in adoption of the law as laid down in *Gore v. Brazier*, 3 Mass. 523, 542.

## CHAPTER CIV.

### OF HOMESTEADS.

For a general review of the cases relative to the nature of an estate of homestead, see Opinion of GRAY, J. in *Silloway v. Brown*, 12 Allen 30, 32.

An estate of homestead is an estate of freehold. *Kerley v. Kerley*, 13 Allen 286.

As to the extent to which a state law, exempting a home-

stead from being taken on execution, can control the process of the United States courts, see 1 American Law Review, 24, 27.

SECT. 1. "*Every householder having a family.*" An unmarried woman, having no children, is not such. Woodworth v. Comstock, 10 Allen 425.

Although a homestead cannot be acquired except by a householder having a family, yet when once acquired and still occupied by him, it will not be defeated or lost by the death or absence of his wife and children. Silloway v. Brown, 12 Allen 32, 34. — Doyle v. Coburn, 6 Allen 71, 73.

"*Owned or right ly possessed by lease or otherwise.*" This will not include land for which a party has only a bond for a deed. Thurston v. Maddocks, 6 Allen 427, 428. Nor land in which one has only an undivided interest as tenant in common. Bates v. Bates, 97 Mass. 392, 396. — Thurston v. Maddocks, 6 Allen 427, 429.

"*Occupied by him as a residence.*" An estate of homestead is not necessarily limited to that portion of a dwelling-house occupied by the family of the owner, but it may extend to the whole of a house, some parts of which are let to tenants. Mercier v. Chace, 11 Allen 194.

An estate of homestead may exist in a country hotel. Lazell v. Lazell, 8 Allen 575.

"*Sale for the payment of his debts.*" Under the laws prior to the General Statutes, the homestead of a spendthrift might have been sold by his guardian for the payment of his debts. Wilbur v. Hickey, 8 Gray 432.

SECT. 2. Making and recording a declaration under this section, and beginning to build a house upon the land, will not entitle one to an estate of homestead therein, until he actually occupies the same as a residence, and the fact that, several months before making such declaration, he had for a short time and for a temporary purpose occupied a house then standing upon the land, is immaterial. Lee v. Miller, 11 Allen 37.

SECT. 3. "*All existing estates or rights of homesteads, &c.,*

*shall continue to be held and enjoyed,"* &c. See *Dulanty v. Pynchon*, 6 Allen 510, 511.

"*Shall not require the design so to hold the same to be declared and recorded anew.*" Nor, it seems, is it requisite that such design should be declared and recorded at all, where the estate of homestead was acquired under St. 1855, c. 298, which did not require such declaration and record. *Clark v. Potter*, 13 Gray 21, 23.

SECT. 5. "*For a debt contracted before the deed,*" &c. A debt was held to be so contracted, where the money was borrowed before, though a note was given after the delivery of the deed. *Stevens v. Stevens*, 10 Allen 146.

As to the effect of substituting new notes for old ones, given before the recording of the deed, see *Tucker v. Drake*, 11 Allen 145.

Where there are debts so contracted to an amount of less than \$800, the householder will be entitled to have set off to him a homestead of the value of \$800, less the amount of such debts. *Clark v. Potter*, 13 Gray 21.

SECT. 8. "*No release or waiver thereof shall operate,*" &c. Until a new homestead is acquired elsewhere, no mere *abandonment* of premises, to which the homestead exemption has once attached, will be sufficient to terminate it. (This has been directly decided only as to homesteads acquired under St. 1855, c. 238, and St. 1857, c. 298, but it seems to be equally applicable to those acquired under St. 1851, c. 340, or under this chapter.) *Woodbury v. Luddy*, 14 Allen 1, 5. — *Connor v. McMurray*, 2 Allen 202, 204. See also *Lazell v. Lazell*, 8 Allen 575, 576. — *Dulanty v. Pynchon*, 6 Allen 510. — *Drury v. Batchelder*, 11 Gray 214.

"*In which the wife \* \* \* joins for the purpose of releasing the same.*" She does not so join by simply inserting her name in the final clause of the deed, and signing and sealing it. *Greenough v. Turner*, 11 Gray 332.

A release of homestead in a *mortgage* deed does not have the



effect of wholly releasing the right of homestead, but only of subjecting the homestead, as well as the residue of the estate, to the payment of the mortgage debt. *Swan v. Stephens*, 99 Mass. 7, 10.

“*But any deed duly executed without such release shall be valid to pass,*” &c. Under St. 1851, c. 340, and St. 1855, c. 238, a deed without such release was voidable as to the whole interest which it purported to convey. *Wildes v. Vanvoorhis*, 15 Gray 139. — *Richards v. Chace*, 2 Gray 383. — *Greenough v. Turner*, 11 Gray 332. See also St. 1857, c. 298, s. 13, which purports to confirm such deeds, and remarks upon that statute in *Wildes v. Vanvoorhis*, 15 Gray 139, 145.

Under St. 1857, c. 298, as well as under the General Statutes, a deed by the husband alone will convey his reversionary interest after the expiration of the estate of homestead, although the whole estate at the time of giving the deed was not worth \$800. *Smith v. Provin*, 4 Allen 516, 517.

A husband who has given a warranty deed of the homestead premises, but without his wife's release, will nevertheless not be estopped from bringing an action in his own name to recover the homestead estate. *Connor v. McMurray*, 2 Allen 202. — *Doyle v. Coburn*, 6 Allen 71.

Where an estate is conveyed to one who simultaneously executes and delivers a mortgage back to his grantor, such mortgage will be valid without any release of homestead. *New England Jewelry Co. v. Merriam*, 2 Allen 390.

SECT. 10. The court of insolvency cannot set off an estate of homestead under this section after the assignee in insolvency has sold and conveyed away all his interest in the estate. *Silloway v. Brown*, 12 Allen 30, 34.

SECT. 11. “*On property claimed by the debtor to be exempt,*” &c. If the debtor makes no such claim, a levy of the execution in the ordinary way will be valid. *Livermore v. Boutelle*, 11 Gray 217, 221.

“*Provided, that if the property is subject to a mortgage, it may*

*be set off or sold subject to the mortgage and the estate of homestead," &c.* A sale on execution of a mortgaged estate, subject to a homestead, will however be valid, although neither in the sheriff's deed, nor in his return on the execution, nor at the sale, was any reference made to the right of homestead. *Swan v. Stephens*, 99 Mass. 7, 9.

As to the mode of levying execution, under prior statutes, upon land in which an estate of homestead existed, see *Pittsfield Bank v. Howk*, 4 Allen 347.

SECT. 12. The title to the homestead estate will be in the widow during widowhood, and in all the minor children while under age, but the right of possession and enjoyment will be in such only of those who have title, as remain in occupation of the premises. *Abbott v. Abbott*, 97 Mass. 136, 139.

A widow is entitled to enjoy the benefit of an estate of homestead, not only by her own personal occupation of it, but also by letting it to others. *Mercier v. Chace*, 11 Allen 194, 195.

An assignment of dower to a widow in part of a dwelling-house will not prevent her from claiming an estate of homestead in the residue of it. *Mercier v. Chace*, 11 Allen 194.

But if a widow, having had one-third of the rents and profits of an estate assigned to her as dower, conveys that interest to a third party, she renders it impossible that her homestead should be set off to her, and she will be deemed to have relinquished it. *Bates v. Bates*, 97 Mass. 392, 395.

SECT. 13. Where the estate, in which the right of homestead exists, is worth less than \$800, and the widow is in occupation, she may avail herself of her right of homestead as a defence, as against one who claims title under her husband, although her homestead has not been set off to her under this section. *Parks v. Reilly*, 5 Allen 77.

"*In the same manner as dower,*" &c. The probate court has no jurisdiction to set off an estate of homestead, if the

right to it is disputed by the heirs or devisees. *Woodward v. Lincoln*, 9 Allen 239. — *Mercier v. Chace*, 9 Allen 242. — *Lazell v. Lazell*, 8 Allen 575.

SECT. 14. See *Mercier v. Chace*, 11 Allen 194, 195.

---

## TITLE VI.

---

### CHAPTER CV.<sup>1</sup>

#### OF THE PREVENTION OF FRAUDS AND PERJURIES.

SECTIONS one and five of this chapter are copied almost verbatim from the fourth and seventeenth sections of the English Statute of Frauds, 29 Chas. II. c. 3.

SECT. 1. "*No action shall be brought in any of the following cases.*" The contracts referred to in this section, though they cannot be enforced in a court at law, are not absolutely void, but are available for some purposes. A parol contract for the sale of land, though not enforceable as a contract, may operate as a license to enter upon the land, and, until revoked, will be a good answer to an action of trespass by the owner. If the contract has been fully executed, it must be regarded as a valid contract in all its terms, and nothing further can be recovered on a quantum meruit or valebat. *King v. Welcome*, 5 Gray 41. — *Stone v. Dennison*, 3 Pick. 1. — *Trowbridge v. Wetherbee*, 11 Allen 361. See also cases of *Beal v. Brown* and *Cahill v. Bigelow*, cited on page 230.

A promise, which is within the statute, cannot be used as a defence in an action. *King v. Welcome*, 5 Gray 41.

*Promises implied by law* are not within the statute. Good-

<sup>1</sup> The notes upon this chapter have been prepared by Henry H. Sprague, Esq.

win v. Gilbert, 9 Mass. 510. — Felch v. Taylor, 13 Pick. 133, 136. — Pike v. Brown, 7 Cush. 133, 136.

*"First. To charge an executor, administrator, or assignee under any insolvent law of this commonwealth, upon a special promise to answer damages out of his own estate."* An oral promise to pay a debt of his testator, made by an executor, who, as residuary legatee, has given bond to pay all debts and legacies of the testator, is not within the statute, the bond being an admission by the executor, which he is estopped to deny, of the possession by him of sufficient assets of the deceased. Stebbins v. Smith, 4 Pick. 97, 100. — Colwell v. Alger, 5 Gray 67.

But an executor or administrator will not, in other cases, by reason of having admitted that he has sufficient funds of the deceased to pay all his debts, be held liable on an oral promise to pay a debt of his testator or intestate. Silsbee v. Ingalls, Pick. 526, 527.

The English statute referred only to promises by executors and administrators; *assignees under insolvent laws* were first brought within our statute in 1848. St. 1848, c. 252. A promise by an assignee to pay to his insolvent a certain sum, in consideration of his having arranged a compromise of a suit brought against the assignee, has been held not to be within the statute. Holbrook v. Dow, 12 Gray 357.

*"Second. To charge a person upon a special promise to answer for the debt, default, or misdoings of another."* This provision of the statute applies only to a promise made to one to whom another is answerable, i. e., to a creditor, and not to a promise made to a debtor to pay a debt due from him to a third party, or to indemnify him, if he (the debtor) has to pay a certain debt or obligation. Aldrich v. Ames, 9 Gray 76. — Colt v. Root, 17 Mass. 229. — Weld v. Cushing, 17 Pick. 538. — Preble v. Baldwin, 6 Cush. 552. — Pike v. Brown, 7 Cush. 133. — Alger v. Scoville, 1 Gray 391. — Perkins v. Littlefield, 5 Allen 370.

To bring a case within the statute, the promise must be strictly collateral, and the chief purpose of the making of the promise must be to secure the payment of the debt of another. If the leading object of the promisor be to induce the promisee, by foregoing some advantage, interest, or lien, to confer on the promisor a privilege or benefit which he would not otherwise possess or enjoy, such an agreement is not within the statute, but is original and binding, though the subsidiary purpose of the promisor, or the effect of the agreement, be the assumption of the debt by the promisor and the discharge of the liability of a third party. *Nelson v. Boynton*, 3 Met. 396. — *Curtis v. Brown*, 5 Cush. 488. — *Fish v. Thomas*, 5 Gray 45. — *Jepher-son v. Hunt*, 2 Allen 417. If no consideration moves from the promisee to the promisor, the case is within the statute, although there be a consideration moving from the original debtor to the promisor. *Furbish v. Goodnow*, 98 Mass. 296.

When by the new promise the old debt is cancelled or extinguished, and the original debtor ceases to be held as principal, or when the credit is given to the promisor, and the promisor becomes alone liable, it is an original and independent agreement, and not within the statute. *Chapin v. Lapham*, 20 Pick. 467. — *Walker v. Penniman*, 8 Gray 233. — *Wood v. Corcoran*, 1 Allen 405.

When necessities were furnished to one on the oral promise of his brother that he would see the seller paid for them, and it appeared that the seller held the one who received the necessities responsible, and presented the bill to him, it was held that the promise of the brother was within the statute. *Hill v. Raymond*, 3 Allen 540.

So also, of an oral promise made by a father to pay his minor son's debt, not contracted for necessities, although the promise was made in consideration of the creditor's forbearing to demand the same of the son during his last illness. *Dexter v. Blanchard*, 11 Allen 365.

Where goods are delivered to one person, and another, not

a joint contractor with him, promises to pay for them, if any credit is given to the former, the promise of the latter is collateral and within the statute. *Swift v. Pierce*, 13 Allen 136, 138. — *Cahill v. Bigelow*, 18 Pick. 369, 371.

The oral promise of the captain of a military company that he would be responsible for a dinner which the company was eating, he not having done any thing which should lead the landlord to suppose that he had originally ordered the dinner on his personal responsibility, has been held to be within the statute, although the landlord supposed from the first that the captain was to be responsible for all. *Tileston v. Nettleton*, 6 Pick. 509.

If two persons go together to an attorney in order to engage him to defend one of them in a criminal prosecution, *prima facie* the one to be defended is alone responsible, and the liability of the other is within the statute, unless there was an original express promise on his part to pay for the services. *Stone v. Walker*, 13 Gray 613.

A housewright having agreed to build a house for A. and to furnish the materials, A. orally promised B. that, if he would furnish the materials to the housewright, he (A.) would not pay the housewright until the latter had given B. notice so that he might serve a trustee process, and this was held to be an independent agreement, and not a promise to pay the debt of another. *Towne v. Grover*, 9 Pick. 306.

A verbal agreement to guarantee sales on an ordinary *del credere* commission is not within the statute, for the legal effect of such a contract is to make the commission merchant liable at all events for the proceeds of the sale, though his liability does not commence until the sale is made. *Swan v. Nesmith*, 7 Pick. 220.

Though a person be a member of a corporation, if he make an oral promise to pay the debts of such corporation, the promise is within the statute, even though a by-law makes the individual members of the corporation responsible for its debts. *Trustees of Free Schools v. Flint*, 13 Met. 539.

If one, at the request of another, verbally guarantees his debt to a third party, the statute does not make such contract void; it only provides that no action shall be maintained upon it against the guarantor. But he is not bound to take advantage of the statute, he may elect to fulfil his verbal promise, and if he does so and pays his money in pursuance thereof, the principal debtor will be liable for the amount as for money paid at his instance and request. The statute can have no operation as between the original debtor and the guarantor. *Beal v. Brown*, 13 Allen 114.

Where one summoned as trustee in a trustee process answered that money was due from him to the principal defendant, but that he had verbally promised the defendant to pay to a creditor of his a debt of greater amount, it was held that he could not be compelled to set up the statute to avoid such promise, and that, if he did not choose to do so, he was not chargeable as trustee. *Cahill v. Bigelow*, 18 Pick. 369.

*“Fourth. Upon a contract for the sale of lands, tenements, or hereditaments, or of any interest in or concerning them.”* Several questions have arisen in regard to what constitutes an interest in lands. It has been held that neither a sale of trees raised in a nursery and intended to be transplanted, nor a license to enter upon the land and remove such trees, is within the statute. *Whitmarsh v. Walker*, 1 Met. 313. See also, *Miller v. Baker*, 1 Met. 27. So a sale of standing wood or timber to be cut by the vendee, and a contract to enter upon land, cut down trees, and remove the bark, have been held not to be within the statute. *Clafin v. Carpenter*, 4 Met. 580. — *Nettleton v. Sikes*, 8 Met. 34. — *Short v. Woodward*, 13 Gray 86.

An agreement to hire a shop for a year at a certain rent is within the statute. *McMullen v. Riley*, 6 Gray 500.

In general, a permanent right to hold another's land for a particular purpose, and to enter upon it at all times without his

consent, is an interest in lands which can be created only by writing. But the statute does not apply to a license to enter upon the land of another and do any particular act or series of acts, for such a license amounts to nothing more than an excuse for an act which would otherwise be a trespass. Thus a parol license to erect a dam and make a canal and embankments upon another's land, extends only to the particular act, and does not confer any authority to go upon the land to make repairs, &c. As to so much of the license as is unexecuted, it is countermandable, and the transferring of the land to another, or even the leasing of it without any reservation, would of itself be a countermand of the license. Yet it appears that the grantee must give a direct order of countermand before any sum for damages can be obtained for the continuance of acts under the license. *Clafin v. Carpenter*, 4 Met. 580. — *Cook v. Stearns*, 11 Mass. 533.

An oral agreement to waive or release damages, or to take a certain sum for damages occasioned by the flowing of land, or by the taking of land for public purposes, can be enforced notwithstanding the statute, as it is simply a release of a claim for a sum of money, the land itself being taken under the statutes. *Seymour v. Carter*, 2 Met. 520. — *Fitch v. Seymour*, 9 Met. 562. — *Fuller v. Plymouth*, 15 Pick. 81.

Though an agreement to release a covenant of warranty annexed to land is a contract concerning an interest in land, an implied promise by one to pay to another money received for a release of such covenant, is not a contract concerning an interest in lands. *Bliss v. Thompson*, 4 Mass. 488.

Equitable as well as legal interests in land are embraced within the statute, and an agreement with a cestui que trust, who has the entire beneficial interest in land, for its sale and conveyance by the trustee, who is seised of a legal title only, must be in writing. *Richards v. Smith*, 9 Gray 313.

A mortgagor's equity of redemption is also an interest in lands, and cannot be relinquished or transferred by parole.



*Pomeroy v. Windship*, 12 Mass. 514. — *Scott v. McFarland*, 13 Mass. 309.

A parol promise by a mortgagee to his mortgagor, that the latter may remain in possession of the mortgaged premises, is within the statute, and the mortgagee may enter and take possession, notwithstanding his promise. *Coleman v. Packard*, 16 Mass. 39.

An oral agreement, entered into on receipt of an absolute conveyance of land, to make a defeasance to operate as a mortgage, is within the statute. *Boyd v. Stone*, 11 Mass. 342.

An oral promise by a purchaser of land to indemnify the vendor against any claim which should be enforced against him respecting certain partition walls standing upon the premises, has been held not to be within the statute. *Weld v. Nichols*, 17 Pick. 538.

A parol promise to pay an existing debt, though the debt was originally contracted for lands, is not within the statute. *Dillingham v. Russell*, 4 Mass. 400.

Several of the earlier cases have held in general terms that, though one of the parties performs his part of an oral contract for the sale of lands, &c., he cannot compel the other party to perform his part, as part performance does not take such an oral contract out of the statute, even though the fulfilling party has no other remedy. But in all the cases in which part performance has been thus held not to take the contract out of the statute, the part remaining to be performed was the conveyance of an interest in lands, and not the payment of a pecuniary consideration.

For instance, in *Sherburne v. Fuller*, 5 Mass. 133, it is held that, when a deed of land is made and delivered to a party on his oral promise to return it if certain acts are not done, otherwise the property to continue his, such promise cannot be enforced, as the title to the lands was to be changed by the performance of the promise.

In *Kidder v. Hunt*, 1 Pick. 328, the owner of an estate verbally agreed to give a written lease thereof, and the lessee on his

part was to pay a certain sum yearly, and to make certain alterations; and it was held that, even after making the alterations, the tenant could not compel the owner to execute the lease.

In *Griswold v. Messenger*, 6 Pick. 517, the attempt was made to prove that the grantee of a parcel of real estate had verbally, at the time of the conveyance to him, and in consideration of such conveyance, promised to convey the estate to a third party, and it was held that such evidence was inadmissible. See, as to this case, *Basford v. Pearson*, 9 Allen 387, 390.

In *Thompson v. Gould*, 20 Pick. 184, under a parol agreement for the sale of a house and land, the purchaser had paid the purchase-money, but no conveyance had been made, when the house was burnt, and it was held that the loss fell upon the original owner, because the property continued his, and his oral promise to convey could not be enforced.

In *Adams v. Townsend*, 1 Met. 483, there was a parol agreement for the exchange of lands, and though one of the parties had conveyed, the statute prevented him from compelling a conveyance by the other party.

In *Townsend v. Townsend*, 6 Met. 319, the grantee of real estate had orally promised the grantor, as part of the consideration to give him back a life lease, and it was held that such promise could not be enforced.

See also *Jacobs v. Peterboro'* and *Shirley R.R.*, 8 Cush. 223, and *Parker v. Barker*, 2 Met. 423.

When, however, land or any interest in land, has been actually conveyed or transferred under an oral agreement, and the part of the contract remaining to be performed is only the payment of a pecuniary consideration, the part performance takes the contract out of the statute, and the payment can be enforced, notwithstanding that the contract was verbal. *Pomeroy v. Winship*, 12 Mass. 514. — *Davenport v. Mason*, 15 Mass. 85. — *Wilkinson v. Scott*, 17 Mass. 249. — *Brackett v. Evans*, 1 Cush. 79. — *Preble v. Baldwin*, 6 Cush. 549. — *Page v. Monks*, 5 Gray 492. — *Nutting v. Cushing*, 8 Allen 540. —

Basford v. Pearson, 9 Allen 387. — Trowbridge v. Wetherbee, 11 Allen 361.

On the same principle it has been held, that a party who actually performs a promise which is within the statutes, has himself thereby waived the benefit of the statute. Stone v. Dennison, 13 Pick. 1. — Trowbridge v. Wetherbee, 11 Allen 361. Hence, if a party has made advances in money under an oral contract for the purchase of land, and the other party, being in no fault, is both able and ready to convey, the former cannot reclaim his money on the ground that the contract is void under the statute. Congdon v. Knowles, 7 Met. 57. — Congdon v. Perry, 13 Gray 3.

When a party, after receiving the pecuniary consideration, has refused to fulfil his parol contract for the conveyance of an interest in lands, an action against him for money had and received will lie to recover the money paid, the consideration on which it was paid having failed. Thompson v. Gould, 20 Pick. 134. — Cook v. Doggett, 2 Allen 439.

Upon a mutual verbal promise to convey lands in exchange, executed by one of the parties, if the other refuse to convey the land, the one who has actually conveyed may recover of the other on an implied promise to pay the value of the land conveyed. Basford v. Pearson, 9 Allen 387, overruling any implication to the contrary in Griswold v. Messenger, 6 Pick. 517.

*“Fifth. Upon an agreement that is not to be performed within one year from the making thereof.”* To bring a parol contract within the statute, it must have been stipulated or understood by the parties that the agreement was not to be performed within one year, and this stipulation or understanding must have been absolute and without condition; for if the contract be capable of being completely performed within a year, or is of such a character that by the happening of any contingency it may by possibility be performed within a year, it is not within the statute. Peters v. Westboro, 19 Pick. 364. — Lyon v. King, 11 Met. 411. If the complete performance of the contract be

dependent upon the life of the parties, as in the case of an agreement to support a person for a certain number of years, or not to engage in a certain kind of business after the sale of one's interest therein, it is not within the statute. *Peters v. Westboro'*, 19 Pick. 364. — *Lyon v. King*, 11 Met. 411. — *Worthy v. Jones*, 11 Gray 168. — *Doyle v. Dixon*, 97 Mass. 208. A license to cut trees from land at any time within ten years [*Kent v. Kent*, 18 Pick. 569], a contract to labor for five years, or as long as a certain person shall be agent of a company [*Roberts v. Rockbottom Co.*, 7 Met. 46], an agreement to hold his cosurety harmless, made by a surety on an administrator's bond at the time of signing such bond [*Blake v. Cole*, 22 Pick. 97], an agreement to pay a sum of money on the arrival of a ship, or on a party's marriage; to leave a sum of money by will, or to pay to a party an annuity [*Lapham v. Whipple*, 8 Met. 59], are all contracts which are not within the statute. But an agreement to employ an infant for five years, and to pay his father certain sums semiannually for his services, has been held to be within the statute. *Hill v. Hooper*, 1 Gray 131.

Though the contract has been performed on one side, if the counter stipulation, which is the consideration for the part of the contract performed, is not to be fulfilled within one year, it is within the statute. Hence no action lies on an oral promise to pay, at a time more than one year from the making of the promise, for land conveyed to the promisor. *Marcy v. Marcy*, 9 Allen 8.

An agreement to pay the rent of a house for a year, to commence at a day future, is within the statute. *Delano v. Montague*, 4 Cush. 42.

The statute applies to a mere promise by one to pay money, as well as to a mutual agreement where each party stipulates to do something. *Cabot v. Haskins*, 3 Pick. 83.

*"Unless the promise, contract, or agreement, upon which such action is brought, or some memorandum or note thereof,*

*is in writing.*" The memorandum required by the statute must express with reasonable certainty, either by its own terms, or by reference to some other instrument from which it can be ascertained with like reasonable certainty, the substance of the contract, i. e., all the conditions and essential portions of the bargain. *Boardman v. Spooner*, 13 Allen 353. There can be no valid contract which does not show who are the contracting parties. *Sanborn v. Flagler*, 9 Allen 474. Slight uncertainties as to price, as the omission to specify the cost of a deed, or slight additions of interest, do not invalidate the memorandum. *Atwood v. Cobb*, 16 Pick. 227. So the price may be only implied. *Bird v. Richardson*, 8 Pick. 252. A bill of parcels of the usual form is sufficient, though it does not state when the articles are to be delivered or paid for. *Hawkins v. Chace*, 19 Pick. 505. If the memorandum fails to fix the time of fulfilment, a reasonable time is understood. *Atwood v. Cobb*, 16 Pick. 227.

It would seem that the memorandum of a contract, previously made, need not have been written for the purpose of binding the contract, nor be addressed by one to the other of the two parties concerned. *Howe v. Dewing*, 2 Gray 476.—*Browne on Stat. of Frauds*, s. 354. But care is to be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation. *Lyman v. Robinson*, 14 Allen 242.

A letter to an attorney, requesting him to make out the papers necessary to complete the purchase of real estate, sufficiently describing the contract for the purpose, and signed by the purchaser, will be a sufficient memorandum. *Montague v. Hayes*, 10 Gray 609. So if the highest bidder at an auction transfer in writing his right to the estate to a third party, and the seller write his agreement to the transfer underneath with his signature, it is sufficient to bind the latter. *Howe v. Dewing*, 2 Gray 476. It seems that the following memorandum, written on a promissory note,—"This note is to be given up

when I give the promisee a deed of the land which I have engaged to give him,"— is sufficient to compel a conveyance of the land in equity. *Little v. Pearson*, 7 Pick. 301.

The record of a vote of a corporation, signed by its clerk, and stating the terms of a contract of such corporation with a third party, will be a memorandum of such contract sufficient to bind the corporation. *Chase v. Lowell*, 7 Gray 33, 35. — *Tufts v. Plymouth Gold Mining Co.*, 14 Allen 407, 412. — *Johnson v. Trinity Church Soc.*, 11 Allen 123, 126.

If duplicate memoranda are made out, one signed by the vendor and the other by the vendee, and something in regard to the manner of delivery is subsequently added to that signed by the vendor, the vendee will, nevertheless, be held by the original agreement. *Lerned v. Wannemacher*, 9 Allen 412. See also *Rhoades v. Castner*, 12 Allen 130.

A letter alluding to the articles bought and to be delivered, but not stating any one of the elements of a contract,— price, quantity, quality, time, place, or any thing to inform what the nature of the contract was,— is not sufficient. *Waterman v. Meigs*, 4 Cush. 497.

The memorandum, either by itself, or in connection with some other writing contemporaneous with it or referred to in it, must describe or identify the subject of the contract; if it relates to an interest in lands, it must show what that interest is, as whether it relates to an estate in fee, for life, or for years. *Farwell v. Mather*, 10 Allen 322.

A written agreement to convey "a house and lot of land on Amity Street, Lynn, Mass.," is sufficiently accurate as referring to the promisor's own house and lot, and oral evidence is admissible to apply the description and ascertain which lot belongs to the promisor. *Hurley v. Brown*, 98 Mass. 545.

Documents and letters, though all written subsequently to the bargain, may be coupled together to show a sufficient memorandum, if it appear that they all had relation to the contract. *Lerned v. Wannemacher*, 9 Allen 412. — *Johnson v. Trinity*

Church, 11 Allen 128. The connection between them, however, cannot be proved by oral evidence. Boardman v. Spooner, 13 Allen 353.

A warranty or description, contained in the oral bargain, but not in the bill of sale, has no effect. Lamb v. Crafts, 12 Met. 353.

If the written memorandum makes no provision for credit, cash payment is implied, and parol evidence that credit was to be allowed is inadmissible. Ryan v. Hall, 13 Met. 520.

Though no verbal agreement between the parties to a written contract, whether made before or at the time of the execution of such contract, is admissible to vary its terms, a similar rule does not apply to a subsequent oral agreement made on a new and valuable consideration. Such subsequent agreement may enlarge the time of performance, or may vary any other terms of the contract, or may waive and discharge it altogether; but the action must be brought on the original contract, and the defendant, or the plaintiff, in answer to the defence, may prove that he has performed the contract according to an oral agreement for a substituted performance, or that, being ready, he was not allowed to do so. Cummings v. Arnold, 3 Met. 486. — Munroe v. Perkins, 9 Pick. 298. — Stearns v. Hall, 9 Cush. 31. — Whittier v. Dana, 10 Allen 326.

*“Signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized.”*

To constitute a signing within the statute, it is not necessary that the signatures be placed at the bottom of the instrument, but it is sufficient if the party to be charged has inserted his name in any part of the paper. Penniman v. Hartshorn, 13 Mass. 87. — Hawkins v. Chace, 19 Pick. 505. — Cabot v. Hawkins, 3 Pick. 83. — Old Col. R.R. Co. v. Evans, 6 Gray 25.

The *initials* only of the party are sufficient. Sanborn v. Flagler, 9 Allen 474. — Hunter v. Giddings, 97 Mass. 41. The signature may be made by an agent, even though he write his own name instead of that of his principal, and though no intimation of his agency appears on the memorandum, if it was his

intention that his principal should be bound. *Williams v. Bacon*, 2 Gray 387. — *Huntington v. Knox*, 7 Cush. 371. — *Lerned v. Johnson*, 9 Allen 419. The authority of the agent may be proved by parol evidence. *Hawkins v. Chace*, 19 Pick. 505. — *Ulen v. Kittredge*, 7 Mass. 233. A partner may sign his own name for the firm. *Sanborn v. Flagler*, 9 Allen 474.

A memorandum signed by one of the parties to a mutual contract, to which the other agrees orally, holds good against the former (*Penniman v. Hartshorn*, 13 Mass. 87. — *Cabot v. Haskins*, 3 Pick. 83. — *Old Col. R. R. v. Evans*, 6 Gray 25), though it does not bind the latter. *Tisdale v. Harris*, 20 Pick. 9.

The production of a bill of sale of goods with the purchaser's name stamped thereon, but without any evidence showing under what circumstances it was stamped, is not sufficient evidence of a signing by the purchaser. *Boardman v. Spooner*, 13 Allen 353.

An auctioneer being the agent of both parties, his signature to a memorandum will bind both so as to satisfy the statute. *Penniman v. Hartshorn*, 13 Mass. 87. — *Davis v. Rowell*, 2 Pick. 64. This rule applies to a sale of land as well as to a sale of chattels. *Morton v. Dean*, 13 Met. 385. — *Gill v. Bicknell*, 2 Cush. 325. The memorandum must refer to the conditions of the sale and to the material terms of the agreement (*Morton v. Dean*, and *Gill v. Bicknell*, *ubi supra*), and should designate clearly what was sold, by whom, to whom, the time when, and the price. *Fessenden v. Mussey*, 11 Cush. 127. If, however, the auctioneer is himself one of the parties, or acts as representative of one, in the character of guardian, executor, or trustee, his memorandum will not bind the other. *Bent v. Cobb*, 9 Gray, 397. See also *Shaw v. Finney*, 13 Met. 453.

*Contracts in part within the statute.*

If a part of an agreement cannot be enforced, being within the statute, but another part would by itself be valid, such part



will avail pro tanto, provided that the sound can be separated from the unsound, and can be enforced without doing injustice on account of being a part performance. *Rand v. Mather*, 11 Cush. 1, overruling in part *Loomis v. Newhall*, 15 Pick. 159. If, however, the valid part of the contract be so dependent upon the other portion that the advantage accruing from it arises from the enforcement of the void portion, the whole fails; for instance, where a contract comprised the sale of coal and payment of the cost of transportation, the former part being void under the statute, the latter portion could not be enforced, as it was dependent upon and useless without the former. *Irving v. Stone*, 6 Cush. 508. So where one made an oral agreement to hire a shop for a year, and to pay for fixtures to be put in by the landlord, it was held that the landlord, after having refused to give a lease, could not maintain an action for the cost of the fixtures. *McMullen v. Riley*, 6 Gray 500. If the part to which the statute applies has been already executed, the statute cannot then be pleaded to excuse the further performance. When a contract provides both for the conveyance and the filling up of low lands, the party contracting cannot, after conveying and receiving payment in money, relieve himself by the statute from filling the flats. *Page v. Monk*, 5 Gray 492. — *Trowbridge v. Wetherbee*, 11 Allen 361.

SECT. 2. "*The consideration of such promise, contract, or agreement, need not be set forth or expressed in the writing signed by the party to be charged therewith, but may be proved by any other legal evidence.*" See *Packard v. Richardson*, 17 Mass. 122.

The statute does not render the consideration for the promise any the less necessary. *Thacher v. Dinsmoor*, 5 Mass. 299. — *Loomis v. Newhall*, 15 Pick. 161. — *Stone v. Symmes*, 18 Pick. 467. — *Curtis v. Brown*, 5 Cush. 49. — *Nelson v. Boynton*, 3 Met. 396. — *Alger v. Scoville*, 1 Gray 391. — *Walker v. Penniman*, 8 Gray 233. Though the consideration may be proved by parole, or a different one from that recited may be

shown, an independent agreement cannot be established under such guise, or any thing added to or taken from the written provisions of the instrument. *Howe v. Walker*, 4 Gray 318.

SECT. 3. "*No promise for the payment of any debt made by an insolvent debtor, who has obtained his discharge from said debt, shall be evidence,*" &c. The following points were decided before the passage of the statute requiring the promise to be in writing. There must be a distinct, unequivocal, and subsequent promise, in order to revive the liability of an insolvent, and any intention to pay the debt, though expressed in the strongest terms, is not sufficient. Whether such promise can be inferred from the evidence is to be determined by the jury. *United Society in Canterbury v. Winkley*, 7 Gray 460. — *Pratt v. Russell*, 7 Cush. 562. Such promise cannot be inferred from the mere fact that the insolvent paid part of a promissory note to his creditor, and indorsed thereon the sum paid (*Merriam v. Bayley*, 1 Cush. 77), or that he paid the interest as it became due. *Cambridge Inst. for Savings v. Littlefield*, 6 Cush. 210. A written agreement between a debtor and creditor that the amount of the principal of a note barred by a discharge shall be indorsed on the note, and received by the debtor in part payment of a sum due on a special contract, is not such a new promise. *Kelley v. Pike*, 5 Cush. 484. Proof of a promise, made before the discharge, is not competent for any purpose. *Reed v. Frederick*, 8 Gray 230.

SECT. 4. "*No action shall be brought to charge a person upon or by reason of any representations or assurance made concerning the character, conduct, credit, ability, trade, or dealings of any other person, unless such representation or assurance is made in writing and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.*"

This section applies only to those cases in which the representations are made with the intent or purpose that the person, concerning whom they are made, may obtain credit, money, or goods thereupon. *Medbury v. Watson*, 6 Met. 246, 249. —

*Norton v. Huxley*, 13 Gray 285, 287. If such intent exists, it is wholly immaterial that the party making the representations has some additional or ulterior object or motive, such as an advantage to himself, that will result from the credit acquired by the person concerning whom the representations are made. *Mann v. Blanchard*, 2 Allen 386. — *Wells v. Prince*, 15-Gray 562. — *Kimball v. Comstock*, 14 Gray 508, 570.

A fraudulent representation made concerning a corporation, in order to induce a person to give up property to the corporation and take its notes in payment, is within the statute, although the one who makes the representation is himself the treasurer of the corporation. *McKenney v. Whitney*, 8 Allen 207.

Though a person who procures a note to be discounted at a bank impliedly warrants the genuineness of the signatures of the makers and indorsers, such implied warranty is not within the statute. *Cabot Bank v. Morton*, 4 Gray 156.

SECT. 5. "*No contract for the sale of goods, wares, or merchandise, for the price of fifty dollars or more, shall be good or valid,*" &c. This section is copied from the seventeenth section of the English statute of frauds. The words "goods" and "merchandise" are both of very large signification. *Bona* in the civil law is almost as extensive as personal property itself, and in many respects it has nearly as large a signification in the common law. Merchandise includes, in general, objects of trade and commerce. *Tisdale v. Harris*, 20 Pick. 9.

Contracts for the sale of stocks in incorporated companies (*Tisdale v. Harris*, 20 Pick. 9), and of promissory notes (*Baldwin v. Williams*, 3 Met. 365), have been held to be within the statute.

The statute applies as well to contracts to be executed at a future time, as to those which are to be executed immediately (*Waterman v. Meigs*, 4 Cush. 497); and to sales not only of articles existing at the time, but of those which the vendor is habitually making and selling in the course of his business,

though they are not then made or finished. *Mixer v. Howarth*, 21 Pick. 205. For instance, A. asked B. what he would take for candles ; B. said he would take twenty cents per pound ; A. said he would take one hundred boxes ; B. said the candles were not manufactured, but that he would manufacture and deliver them in the course of the summer, and the contract was held to be within the statute. *Gardner v. Joy*, 9 Met. 177.

When, however, a workman pursuant to an agreement puts materials together and constructs an article, whether at an agreed price or not, though in common parlance this is called a purchase and sale, it is not legally a sale until there is an actual or constructive delivery and acceptance. *Mixer v. Howarth*, 21 Pick. 205. — *Lamb v. Crafts*, 12 Met. 353. A carriage-maker, having no carriages lined, contracted to finish one in a fortnight for a purchaser, who selected the lining to be used, and such contract was held to be an agreement with a workman to construct an article for his employer, and not a contract for the sale of goods, &c., within the statute. *Mixer v. Howarth*, 21 Pick. 205. In like manner an agreement to make machines for a specified price, and to find materials therefor, is not within the statute. *Spencer v. Cone*, 1 Met. 283.

*"Unless the purchaser accepts and receives a part of the goods so sold."* An acceptance, and not simply a delivery of the goods, must be proved by some clear and unequivocal act of the party to be charged ; the statute does not require, however, that the acceptance should be made by the purchaser personally, but any agent duly authorized may receive the property and bind the principal. *Snow v. Warner*, 10 Met. 132. — *Denny v. Williams*, 5 Allen 1. — *Smith v. Gowdy*, 8 Allen 566. — *Howard v. Borden*, 13 Allen 299. See also *Ullman v. Barnard*, 7 Gray 554. A delivery of coal on board a vessel, when the purchaser simply gives orders that the coal be shipped in a vessel that draws less than ten feet, and that freight shall not

exceed a certain sum per ton, does not satisfy the statute—at least if the coal is consigned to the agent of the vendors. *Frostburg Mining Co. v. N. E. Glass Co.*, 9 Cush. 115.

In a case in which a steam engine was sold, which was attached to the realty, but was to be removed at a future day, when the price was to be paid, it was held that there was no delivery of the engine, though at the time of the sale the vendor said to the vendee "Then you consider the engine to be yours as it is," and the vendee replied, "Yes." *Dole v. Stimpson*, 21 Pick. 384.

But when growing cabbages were sold, and afterwards the cabbages, when ready for gathering, were counted by the parties, and it was agreed that the purchaser might take them away at any time, it was held that there had been a sufficient delivery and acceptance to satisfy the statute. *Ross v. Welch*, 11 Gray 285. The acceptance of a bill of goods, which are in a warehouse in another state, with an order on the warehouseman for their delivery, without notice being given to the warehouseman, is not an acceptance or receipt of the goods within the statute. *Boardman v. Spooner*, 13 Allen 353.

To constitute a part delivery and acceptance within the statute, it must be shown that the goods delivered were delivered as part of those sold; a judgment against the vendee for such goods, at a different price from that in the original contract, is conclusive that they were not delivered in accordance with the contract. *Davis v. Eastman*, 1 Allen 422.

A part acceptance subsequent to the oral agreement is sufficient to take the contract out of the statute. Where a contract was made for several mows of hay, to be paid for as each load was delivered, the delivery and acceptance of three loads made the contract for the whole binding. *Marsh v. Hyde*, 3 Gray 331. But the delivery and acceptance of a part, after the time stipulated for the delivery in the agreement, will not take the contract out of the statute as to the remainder; if, however, at the time of such part delivery the vendee agrees to

take the remainder, and the vendor agrees to deliver them, this is a new contract which is taken out of the statute by the delivery then made. *Damon v. Osborne*, 1 Pick. 476.

A promise to accept and pay an order for the delivery of stock in a corporation, which the drawee had agreed to deliver in payment for certain goods sold to him, is not within the statute, if the goods sold have been already delivered, as the delivery of the goods amounts to payment for the stock, and the promise is simply one to transfer stock already purchased and paid for; otherwise, however, if the goods have not been delivered. *Eastern R.R. v. Benedict*, 10 Gray 212, 215. — s. c. 15 Gray 289, 291.

SECT. 6. Our court has held, upon a contract made under the New York statute, which is similar to ours, that the law requires that the vendor should, at the time of making the contract, be the owner of the stock he stipulates to transfer, and the burden of proof is on him to establish this fact; nor is it sufficient that the vendor owns the amount of the stock which he stipulates to sell, if he has made previous contracts for the sale of the same stock to an amount large enough to embrace all that is owned by him. *Stebbins v. Leowolf*, 3 Cush. 137.

If an agent makes a contract for the purchase of stock, being ignorant that the vendor is not the real owner, he is not, upon discovering that fact, bound to refuse to fulfil the agreement upon that ground, unless instructed to do so by his principal. *Durant v. Burt*, 98 Mass. 161.

A contract made by a broker to sell certain stock for another, invest the proceeds in other stock, and finally to sell such other stock, the profits of such transactions to be shared by the parties, but any losses to be borne by the broker alone, is not within the statute. *Barrett v. Hyde*, 7 Gray, 160.

## TITLE VII.

## OF THE DOMESTIC RELATIONS.

## CHAPTER CVI.

## OF MARRIAGE.

FOR an article on marriage, as affected by the conflict of laws, see 2 American Law Review, 214.

SECT. 5. "*Insane person.*" The words "insane person" include every idiot, non compos, lunatic, insane, and distracted person. Gen. St. c. 3, s. 7, cl. 8. By the common law, all persons who have not at the time the regular use of the understanding sufficient to deal with discretion in the common affairs of life, are incapable of agreeing to the contract of marriage or to any other contract. *Middleborough v. Rochester*, 12 Mass. 368. — Anonymous, 4 Pick. 32. — 2 Kent Com. 75, 76. As to the effect which the intoxication of one of the parties would have on the validity of a marriage, see 1 Pars. Cont. 310, 311.

SECT. 6. Except as provided in this section, it seems that all marriages, which are not incestuous, are valid here, if they are valid where they were solemnized. Those marriages are deemed incestuous which are between persons in the direct line of consanguinity, or between brother and sister. A marriage between a nephew and an aunt is not incestuous. *Sutton v. Warren*, 10 Met. 451. — *West Cambridge v. Lexington*, 1 Pick. 506.

SECT. 7. For an act relating to the marriage of non-resident parties, which provides that notice of their intention shall be entered in the office of the clerk or registrar of the city or town in which they propose to have the marriage solemnized, see St. 1867, c. 58, s. 1.

SECT. 8. See St. 1867, c. 58, s. 1.

SECT. 14. "*Marriages may be solemnized.*" No form of words is established for the solemnization of a marriage. The usage is for the justice or minister to require of the parties respectively an assent to a mutual agreement to take each other for husband and wife, but it would be sufficient if the parties themselves made a mutual agreement in the presence of the justice or minister with his assent, he undertaking to act on that occasion in his official character. *Milford v. Worcester*, 7 Mass. 48, 54.

"*When either of the parties resides in the same county.*" This restriction on the authority of a justice of the peace was abolished by St. 1867, c. 58, s. 2.

"*Minister of the gospel ordained according to the usage of his denomination.*" See *Commonwealth v. Spooner*, 1 Pick. 234.

SECT. 18. For a similar provision in regard to the marriage of non-resident parties, see St. 1867, c. 58, s. 3.

SECT. 21. See *Kennedy v. Doyle*, 10 Allen 161, 164.

SECT. 22. "*The fact of marriage.*" When a marriage de facto is proved, the presumption is that the marriage was solemnized according to law. *Raynham v. Canton*, 3 Pick. 293.

"*Or of general repute.*" In order to prove a former marriage in England, in support of an indictment for polygamy, it was held that a witness might testify to the general repute there at a time anterior to his acquaintance with the defendant. *Commonwealth v. Johnson*, 10 Allen 196.

"*Or of cohabitation as married persons.*" See *Commonwealth v. Hurley*, 14 Gray 411. — *Loring v. Thorndike*, 5 Allen 257, 268.

SECT. 23. See *Loring v. Thorndike*, 5 Allen 257.



## CHAPTER CVII.

## OF DIVORCE.

State laws granting divorces are not unconstitutional as impairing the obligation of contracts, if they simply enable the courts to liberate one of the parties, when the contract has been broken by the other. *Dartmouth College v. Woodward*, 4 Wheaton 518, 629, 696.

SECT. 2. This provision has been held to be constitutional, and to apply to marriages existing at the time of its passage in 1845. *Goshen v. Richmond*, 4 Allen 458.

SECT. 3. "*Age of consent.*" The age of consent is fourteen for males, and twelve for females. 2 Kent Com. 78. — *Parton v. Hervey*, 1 Gray 119.

SECT. 4. By the common law, a marriage obtained by force or fraud is absolutely void without any decree of court. 2 Kent Com. 76.

"*Upon proof of the fraud.*" The fraud must be taken advantage of as soon as it is discovered, and also must be such as goes to the substance of the contract. Hence false representations in regard to the qualities of either of the contracting parties, for instance, as to his or her condition, rank, fortune, manners, character, or even chastity, will not invalidate the contract. If, however, the wife is with child by another man, even though she made no representations in regard to her chastity, the court will declare the marriage void. 2 Kent Com. 77. — *Reynolds v. Reynolds*, 3 Allen 605. — *Donovan v. Donovan*, 9 Allen 140.

Whenever fraud is relied on as the ground of invalidating a contract, it is material not only to prove false and fraudulent representations, but also that they were made under such circumstances as to lead to a reasonable inference that the party was thereby deceived, and induced to enter into the contract

which he seeks to avoid. If it appears that he had the means of ascertaining the falsity of the statements made to him, or that the nature of the transaction and the circumstances attending it were such as to put a reasonable person on inquiry, the presumption of deceit arising from proof of the fraud will be repelled, and the party will be left to bear the consequences of his own want of due diligence and caution. *Foss v. Foss*, 12 Allen 26, 27. — *Crehore v. Crehore*, 97 Mass. 330.

SECT. 6. "*A divorce from the bond of matrimony.*" In all libels for a divorce from the bond of matrimony, a legal marriage must first be proved. *Mangue v. Mangue*, 1 Mass. 240.

"*Adultery.*" A married person is guilty of adultery, if he or she has had, during coverture, voluntary sexual intercourse with any person other than the husband or wife. *Commonwealth v. Call*, 21 Pick. 509. — *Commonwealth v. Thompson*, 2 Cush. 553. Proof of a second marriage will not be sufficient to establish adultery, but cohabitation or actual criminal intercourse must also be shown. *Reemie v. Reemie*, 4 Mass. 586.

Where the adultery which was proved was committed with the knowledge and consent of the libellant, and probably with his connivance, the court refused to grant a divorce. *Pierce v. Pierce*, 3 Pick. 299.

A divorce will not be granted if the libellee was insane at the time the adultery was committed. *Broadstreet v. Broadstreet*, 7 Mass. 474.

It seems that the admission of the respondent, uncorroborated by other circumstances, will not justify the court in granting a divorce for adultery, unless the confession was made prior to the trial, and it is proved that there could not have been any collusion. *Baxter v. Baxter*, 1 Mass. 346. — *Holland v. Holland*, 2 Mass. 154. — *Billings v. Billings*, 11 Pick. 461.

In testifying concerning adultery, the witnesses must state, if possible, the name of the person with whom the crime was committed. If by so doing a witness would criminate himself, he

may of course refuse to testify at all, but if he does aver that the crime was committed, he cannot then refuse to state with whom it was committed. *Brown v. Brown*, 5 Mass. 320.—*Foster v. Pierce*, 11 Cush. 437. If the name of the party is unknown, it will be sufficient to prove that the act was committed with a person not the husband or wife of the party charged. *Commonwealth v. Thompson*, 2 Cush. 551.

“*Impotency.*” By the common law, impotency, in order to be a good ground for divorce, must have existed before the marriage, and must be incurable. Moreover, if the husband or wife at the time of marriage knew that the other was impotent, a divorce could not be obtained. Bishop on Marriage and Divorce, ss. 235, 240. This statute provides for cases of impotency occurring after the marriage has been contracted. See Report of Commissioners on Revised Statutes of 1836, c. 76, s. 5, note.

SECT. 7. “*Deserted.*” Desertion does not signify merely a refusal of matrimonial intercourse, which would be a breach or violation of a single conjugal or marital duty or obligation only, but it imports a cessation of cohabitation, a refusal to live together, which involves the abnegation of all the duties and obligations resulting from the marriage contract. *Southwick v. Southwick*, 97 Mass. 327. Desertion implies want of consent on the part of the party deserted. *Lea v. Lea*, 8 Allen 418.

A divorce for desertion for five years may be granted against a person who has been imprisoned under successive sentences during the greater part of the time, provided that the desertion began before the imprisonment, and that there were opportunities to return which were not improved. *Hews v. Hews*, 7 Gray 279.

Proof of the desertion of the libellant, caused and justified by the misconduct of the libellee, is not sufficient to sustain an allegation of the desertion of the libellee. *Fera v. Fera*, 98 Mass. 155.

SECT. 9. "*A divorce from bed and board.*" In the case of a libel for divorce from bed and board, it has been held that it is not necessary to prove a legal marriage, unless such marriage is denied. *Hill v. Hill*, 2 Mass. 150. As the weight of authority is decidedly against this decision, it is doubtful whether it would now be sustained.

A divorce from bed and board is only a legal separation, terminable at the will of the parties. Upon such divorce the wife is deprived of the protection, and exempted from the control of the husband, and hence she may act, and is to be treated in all respects with reference to her property, as a feme sole. *Dean v. Richmond*, 5 Pick. 461, 467. — *Pierce v. Burnham*, 4 Met. 303. See also sections 40-42 of this chapter. The wife can even bring an action of scire facias against her husband for arrears of alimony. *Morton v. Morton*, 4 Cush. 518.

"*For extreme cruelty,*" &c. The words "gross and confirmed habits of intoxication contracted after marriage, or cruel and abusive treatment" were not in the Revised Statutes of 1836, nor in the Commissioners' Report of 1860, but were added by the legislature when the General Statutes were passed. Under the Revised Statutes it was held that the charge of "extreme cruelty" could only be supported by proof of unprovoked force or violence, and that threats alone were not sufficient. *French v. French*, 4 Mass. 587. — *Hill v. Hill*, 2 Mass. 150. Bishop, however, cites an unreported Massachusetts case in which WILDE, J., with the concurrence of the other judges, decided that one act of cruelty was sufficient, if the court thought the wife in danger of bodily harm, and that she need not be wholly blameless. Bishop on Marriage and Divorce, s. 465.

Under the present statute it has been held that, in order to support a libel "for cruel and abusive treatment," or cruelty in neglecting or refusing to provide suitable maintenance for the wife, it must appear that the cruelty was such as to cause injury to the life, limb, or health of the libellant, or a danger

of such injury, or a reasonable apprehension of such danger, if the parties should continue to live together. *Bailey v. Bailey*, 97 Mass. 373, 380.

SECT. 11. "*Unless it appears that the libellant has removed into this state for the purpose of procuring a divorce.*" As to what would warrant an inference that such was the case, see *Chase v. Chase*, 6 Gray 157.

SECT. 12. "*And one of them lived in this state when the cause occurred.*" If the legal domicile of one of the parties remained within the jurisdiction of this commonwealth when the cause occurred, the requirement of the above provision is satisfied. *Shaw v. Shaw*, 98 Mass. 158.

SECT. 13. Interlocutory orders may be passed by a single judge in any county in term time or in vacation. See St. 1866, c. 148, s. 1.

SECT. 16. "*Shall be signed by the libellant.*" A libel for divorce, filed by a libellant of sound mind, &c., cannot be sustained if it is signed by his attorney, although the attorney was specially empowered by him to sign it. *Gould v. Gould*, 1 Met. 382.

"*Otherwise it may be signed by his or her guardian.*" Quære, whether under this clause a libel could be signed by the guardian of a spendthrift. See *Winslow v. Winslow*, 7 Mass. 96.

The court will entertain a petition, filed by a third party, representing that a libellant for divorce is insane; and if such insanity is established, the court will appoint a guardian ad litem to conduct the cause of the libellant. *Denny v. Denny*, 8 Allen 311.

SECT. 17. By St. 1863, c. 109, it is provided that libels for divorce, in all cases, may be filed in the office of the clerk of the supreme judicial court, in vacation.

SECT. 19. "*May be presented to the supreme judicial court in any county.*" This provision has been extended so that the libel may be presented to any justice of the supreme judicial

court in any county, in vacation or in term time, and such justice may make any order thereon pursuant to this section, with the same effect as if issued by the court. St. 1862, c. 90.

The clerk of the supreme judicial court may in vacation issue any summons or make any order prescribed by this section, provided that the court, or any judge thereof, may cause such additional notice to be given as justice may require. St. 1863, c. 109, s. 2.

SECT. 21. The appointment by the court of a guardian ad litem, in accordance with the provisions of this section, is *prima facie* evidence of the respondent's insanity in any subsequent stage of the cause. *Little v. Little*, 13 Gray 264.

SECT. 23. "*Such sum of money,*" &c. The amount which the court will require of the husband, to enable his wife to maintain or defend a libel for divorce, is not to exceed a reasonable amount for the compensation of counsel and other expenses, under all the circumstances of the case, without regard to the amount which might properly be charged, as between counsel and client, by the counsel actually employed. *Baldwin v. Baldwin*, 6 Gray 341.

SECT. 26. "*Upon such notice.*" The order of notice may be issued by the clerk of the court. See St. 1866, c. 148, s. 4.

For an act authorizing the court to allow a person to marry, against whom a divorce from the bond of matrimony, for the cause of adultery, has been obtained, see St. 1864, c. 216. See also *Cochrane, Petitioner*, 10 Allen 276.

SECT. 32. In all proceedings in the supreme judicial court for the custody of minor children, interlocutory orders may be passed by a single judge, in any county, either in term time or in vacation. St. 1866, c. 148, s. 1.

SECT. 33-37. See note to section 32.

SECT. 38. "*But she shall not be entitled to dower in any other case of divorce from the bond of matrimony.*" The wife's adultery, without divorce, will not deprive her of her right to dower. *Lakin v. Lakin*, 2 Allen 45.

SECT. 40. "*In like manner as if her husband were dead.*" See *Kruger v. Day*, 2 Pick. 316.

"*The whole or any part of the personal property that has come to the husband by reason of marriage.*" See *Dean v. Dean*, 5 Pick. 428. — *Dean v. Richmond*, 5 Pick. 461. See also *Ames v. Chew*, 5 Met. 320.

SECT. 45. The court will not issue an execution for alimony without an affidavit that it is still unpaid, and notice to the respondent. *Newcomb v. Newcomb*, 12 Gray 28.

SECT. 50. As to the attachment of the husband's property on a libel by the wife for divorce, for any cause accruing after marriage, see St. 1866, c. 148, ss. 2, 3.

SECT. 53. Interlocutory orders may be passed by a single judge in any county, either in term time or in vacation. St. 1866, c. 148; s. 1.

For an act allowing decrees of divorce from the bond of matrimony to be entered nisi, to become absolute in six months, or after, &c., see St. 1867, c. 222.

SECT. 54. See *Smith v. Smith*, 13 Gray 209. — *Chase v. Chase*, 6 Gray 157. — *Hood v. Hood*, 11 Allen 196.

"*To obtain a divorce.*" Evidence that one of the parties went into another state, and shortly thereafter applied for and obtained a divorce for causes which would not be sufficient in this state, warrants the inference that such party went into that state "to obtain a divorce." *Chase v. Chase*, 6 Gray 157. — *Lyon v. Lyon*, 2 Gray 367.

SECT. 55. "*A court having jurisdiction of the cause.*" There is no presumption that a court of record in another state has jurisdiction to grant a divorce in a case where no service of process upon the libellee appears by the record to have been made. And further, as to what is necessary to prove a valid divorce in another state, see *Commonwealth v. Blood*, 97 Mass. 538.

"*Shall be valid and effectual in this state.*" If, however, it is alleged that there was fraud or collusion in obtaining any foreign divorce, our courts have the undoubted right to inves-

tigate the circumstances of the case, and if such fraud or collusion is proved, to declare the foreign judgment null and void. *Lyon v. Lyon*, 2 Gray 367, 368. — *Hood v. Hood*, 11 Allen 196.

*Of certain Methods by which a Libel for Divorce may be barred.*

**Condonation.** Condonation is the conditional forgiveness by the husband or wife of such conduct on the part of the other as would be sufficient ground for a divorce, and as long as the condition remains unbroken, the condonation is a perfect bar to a libel for divorce for the cause condoned. Condonation may be proved by an express declaration of forgiveness, but generally is established by implication. 2 Bishop on Marriage and Divorce, ss. 33, 37.

The law will presume condonation if the husband or wife voluntarily continues the connubial intercourse after knowing and believing all the matrimonial offences of the other. 2 Bishop on Marriage and Divorce, ss. 38, 39. — *North v. North*, 5 Mass. 320. — *Anonymous*, 6 Mass. 147. — *Clark v. Clark*, 97 Mass. 331, 332.

It has been held, and it appears to be the sounder view in principle, that in order to establish condonation it is necessary to show that the party not only knew that the other was guilty, but also that he or she was able to prove sufficient to secure a divorce. 2 Bishop on Marriage and Divorce, s. 43. — 10 N. H. Rep. 272.

Condonation is not so easily to be inferred against the wife, from her cohabitation, as against the husband, because such cohabitation for a time may be not only justifiable, but even necessary. *Gardner v. Gardner*, 2 Gray 434, 441.

It has been held that there cannot be any condonation in cases of cruelty (*Perkins v. Perkins*, 6 Mass. 69), but this doctrine has been overruled, and the law now is that there may be condonation in such cases, though the court will be more careful about inferring it. *Gardner v. Gardner*, 2 Gray 434.

The court will presume condonation if the libellant neglects



to prosecute or agrees to dismiss a suit already commenced. 2 Bishop on Marriage and Divorce, s. 48.

The condition of condonation is not only that the same offence shall not be repeated, but also that conjugal kindness shall thereafter prevail. *Gardner v. Gardner*, 2 Gray 434. — *French v. French*, 14 Gray 186. If this condition is broken, the original offences are, as it were, revived, and can be pleaded in court as grounds for a divorce. 2 Bishop on Marriage and Divorce, s. 53.

It is settled that the original offences may be revived by others of the same nature, even though they are less in degree. *Gardner v. Gardner*, 2 Gray 434. — *French v. French*, 14 Gray 186. But it seems that the original offences are not revived by others of a different nature, unless the latter are in themselves grounds for a divorce either from the bond of matrimony or from bed and board. 2 Bishop on Marriage and Divorce, s. 64.

*Recrimination.* Proof that the complainant has been guilty of a similar or greater matrimonial offence will be a perfect bar to a libel for divorce. Otherwise cross suits might be brought, both parties might prevail, both be innocent and both be guilty. The authorities incline to the opinion that proof even of an offence which would only be ground for a divorce from bed and board, will bar a libel for divorce from the bond of matrimony, but the question is not settled. *Hall v. Hall*, 4 Allen 39. — Bishop on Marriage and Divorce, ss. 90, 91, 92. The fact that an offence has been forgiven, does not necessarily interfere with its use in recrimination. 2 Bishop on Marriage and Divorce, s. 99.

*Delay.* Unusual delay in bringing the libel, will, if not explained, operate as a bar, since in such case the presumption arises either of insincerity, condonation, or acquiescence. This presumption is stronger against the husband than against the wife, but in either case it may be explained away. *Clark v. Clark*, 97 Mass. 381. — 2 Bishop on Marriage and Divorce, ss. 103, 111, 112.

## CHAPTER CVIII.

## OF CERTAIN RIGHTS AND LIABILITIES OF HUSBAND AND WIFE.

The provisions of this chapter have been gradually incorporated into the laws of this commonwealth. In 1787, the power was given to the supreme court to authorize a woman, when abandoned by her husband without provision for her maintenance, or when her husband had been confined in the state prison, to convert her real estate, and the personal property held by the husband through marriage, into funds for her own use. St. 1787, c. 32. In 1845, her powers were much enlarged. She was allowed to hold property to her separate use by an ante-nuptial contract; to receive property, while married, by conveyance or devise, to her sole and separate use, and to hold the same without the intervention of a trustee, with the same rights and liabilities as if sole; but she was expressly prohibited the use of such property in trade and commerce. St. 1845, c. 208. The legislature of 1846 made her receipt for money earned by her or deposited by her a valid discharge, and in 1852 the same effect was given to her receipt for property held in trust for her. St. 1846, c. 209. — St. 1852, c. 292. In 1855, much greater privileges for holding property were conferred upon her. She was permitted to carry on trade or business, and perform labor or service on her separate account, and to hold her earnings as her sole and separate property. It was also provided that the property which any woman, thereafter married, might own at the time of marriage, the profits and proceeds thereof, and the property which should come to her by descent, devise, or bequest, or by the gift of any person except her husband, should be her separate property, independent of the husband's control, and free from liability for his debts. St. 1855, c. 304. An act of 1857 extended the same provisions to the property of all women then married. St. 1857, c. 249.

For a general review of the statutes and decisions in Massachusetts since 1836, in relation to married women, see 23 Law Reporter 362.

The rights and powers over property, given to married women by the statutes, being exceptional to the common law, must be construed strictly, and the statutes do not vary the presumption, in the absence of evidence, that personal property, though in the wife's possession, is in reality the property of the husband. *Commonwealth v. Williams*, 7 Gray 337. — *Carley v. Green*, 12 Allen 104.

There is nothing in the statutes to release a husband from responsibility for criminal acts of his wife in keeping as a brothel the house in which he lives with her as her husband. *Commonwealth v. Wood*, 97 Mass. 225, 229. Neither do the statutes change the rules of evidence or the legal presumptions applicable to married women and to their acts in criminal proceedings. *Commonwealth v. Gannon*, 97 Mass. 547, 548.

The statutes do not allow a married woman to contract with her husband. *Lord v. Parker*, 3 Allen 127. — *Edwards v. Stevens*, 3 Allen 315. — *Plumer v. Lord*, 5 Allen 460, 461.

A deputy sheriff cannot, by virtue of an execution, sell and convey an equity of redemption of real estate to the wife of the judgment debtor; but the title will remain in the husband, notwithstanding such conveyance. *Stetson v. O'Sullivan*, 8 Allen 321.

An indorsement of a promissory note by a husband to his wife will not vest in her a valid title to the note. *Gay v. Kingley*, 11 Allen 345.

When a married woman, to secure her husband's debt, joined with him in a mortgage of her separate estate, it was held that she was entitled, after his death, to have such mortgage paid out of his estate. *Savage v. Winchester*, 15 Gray 453, 455.

Although a woman comes into this state for the express purpose of getting married, it seems that the provisions of this

chapter will apply to her as long as she remains here. Read *v. Earle*, 12 Gray 423.

A married woman may be an executrix, administratrix, guardian, or trustee. See St. 1869, c. 409.

Policies of insurance, assigned to married women, are to inure to their sole benefit, &c. See St. 1864, c. 197.

A married woman may make contracts for necessities to be furnished to herself and family, and may sue and be sued thereon as if sole. St. 1869, c. 304. See also *Rogers v. Ward*, 8 Allen 387. — *Willard v. Eastham*, 15 Gray, 328, 334, 335.

SECT. 1. "*Now owns as her sole and separate property.*" The separate *real* estate of married women, at the time of the passage of the General Statutes of 1860, included that held by them under ante-nuptial contracts, or conveyed or devised to their sole and separate use under St. 1845, c. 208; also that which women married in this commonwealth after June 3d, 1855, owned at the time of their marriage, or which they had subsequently received by descent, devise, or the gift of any person except their husbands (St. 1855, c. 304); and also that which had come in either of these ways after June 27th, 1857, to any woman then married in this commonwealth. St. 1857, c. 249.

The separate *personal* estate of married women at the same period is to be determined by similar rules. See *Alexander v. Crittenden*, 4 Allen 342. — *Smith v. Bird*, 3 Allen 34.

"*Grant.*" It is not necessary in a deed to a married woman to express that the conveyance is "to her sole and separate use." See the notes on this section in the Commissioners' Report on the General Statutes. But see *Spaulding v. Day*, 10 Allen 96, 98. Prior to the General Statutes, the words "to her sole and separate use" were necessary. St. 1845, c. 208, s. 3. — *Gerrish v. Mason*, 4 Gray 432. — *Jewett v. Davis*, 10 Allen 68.

"*Acquires by her trade, business,*" &c. A married woman, carrying on business on her separate account, must file certain

certificates, or her property will be liable for her husband's debts. St. 1862, c. 198.

If a married woman from time to time buys articles of furniture for family use, paying for them partly with her own earnings and partly with money furnished by her husband, not discriminating any part of the property from the rest as her own, and if there is nothing in the articles themselves to indicate that they were for her personal and exclusive use, it is *prima facie* evidence that she does not claim or have any separate title or exclusive right in any portion of them. *Kelly v. Drew*, 12 Allen 107.

*"Carried on or performed on her sole and separate account."* See *Parker v. Simonds*, 1 Allen 258.

SECT. 2. *"By their joint deed."* It is not sufficient that the wife's name appear at the end as relinquishing all rights in the premises by simply assenting to the husband's act, but she must participate in the operative and granting part of the conveyance. *Wales v. Coffin*, 13 Allen 213. — *Bruce v. Wood*, 1 Met. 542. — *Raymond v. Holden*, 2 Cush. 264. The mere signature and acknowledgment of the wife are not sufficient to convey her interest. *Melvin v. Prop's Locks & Canals*, 16 Pick. 137. If the words of the grant on the part of the wife are full and unqualified, the deed will be considered good, even although the last clause states that she executes it "in relinquishment of dower." *Perkins v. Richardson*, 11 Allen 538.

*"But the wife shall not be bound by any covenant," &c.* Whether such a covenant will operate by way of estoppel *quære*. See *Nash v. Spofford*, 10 Met. 192. — *Wight v. Shaw*, 5 Cush. 56, 66. — *Doane v. Willcutt*, 5 Gray 328, 332. — *Fowler v. Shearer*, 7 Mass. 14, 21. — *Colcord v. Swan*, 7 Mass. 291. See also the corresponding section as reported by the Commissioners on the Revised Statutes of 1836.

SECT. 3. The property converted and held by the wife to her own use according to the statute of 1787, might be disposed of by her by deed, or in any other manner, as if she was un-

married, and she was bound by all contracts made in relation to the same. In 1842, a married woman of twenty-one was allowed to dispose, by will, of property held separately, provided that the rights and interests of the husband to and in such property were not affected. The husband's assent was required to make the disposal valid, but the wife might revoke the will at pleasure. St. 1842, c. 74. An act of 1850 gave her the privilege of devising or bequeathing to the husband also, and in such case his assent was not necessary. St. 1850, c. 200. The acts of 1855 and 1857 gave her generally the power of disposing of the property, which she was empowered to hold separately, in the same manner as if unmarried, with the exception that a conveyance of real estate or of shares in a corporation required her husband's assent. St. 1855, c. 304.—St. 1857, c. 249. The provisions of all these statutes are embraced in the General Statutes.

*“Bargain, sell, and convey.”* It has been determined that this statute authorizes a general disposal of property, and not simply a technical bargain and sale, and allows the wife to make an executory contract for the sale of her lands, provided always that such contract has the written assent of her husband. *Baker v. Hathaway*, 5 Allen 103.—*Townsley v. Chapin*, 12 Allen 476, 479.

*“Her separate real and personal property.”* Property, which the wife holds as the constructive trustee of the husband, is in the sense of the statute her separate property. *Clark v. Jones*, 5 Allen 379.

The fact that a husband works upon land which is the sole and separate property of his wife does not make the crop raised, the property of the husband, or liable to be taken on execution for his debts, if he is not tenant of the land, nor entitled by agreement to any interest in the crop, and there is no proof of any intent to delay or defraud his creditors. *McIntyre v. Knowlton*, 6 Allen 565.

*“Enter into any contracts,” &c.* The statutes do not change

the common law as to the legal incapacity of the husband and wife to make contracts with each other. They do not enable a married woman to convey to her husband any property, or receive any conveyance from him, to lend him money, take his promissory notes, or deal generally with him as with other persons. A married woman cannot contract with the firm in which her husband is partner, and on this ground she could not, even previously to St. 1863, c. 165, enter into any partnership of which he was a member. *Jackson v. Parks*, 10 Cush. 550.—*Lord v. Parker*, 3 Allen 127.—*Edwards v. Stevens*, 3 Allen 315.—*Ingham v. White*, 4 Allen 412.—*Thomson v. O'Sullivan*, 6 Allen 303.—*Plumer v. Lord*, 7 Allen 481. A wife may, however, acquire and hold as separate property the notes of her husband given to a third person, and may enforce payment through such third party. *Stearns v. Bullens*, 8 Allen 581. But a note of a husband given to a third person as trustee for his wife will be wholly void, and cannot be enforced against him in his lifetime or against his administrator after his death, if given for property of the wife, not her separate property, applied by her at a previous time to the payment of the husband's debts. It seems that the rule would be the same if the property had been the separate property of the wife. *Phillips v. Frye*, 14 Allen 36.

A wife may act as attorney for her husband. *Fowler v. Shearer*, 12 Mass. 14. If two persons who have made any contract, other than one in contemplation of marriage, subsequently intermarry, such marriage avoids the contract. *Miller v. Goodwin*, 8 Gray 542.

A promissory note given by a married woman in payment for land conveyed to her to her sole and separate use is valid. *Stewart v. Jenkins*, 6 Allen 300. So also a note given by her to a third party for money borrowed to enable her to pay for the land. *Chapman v. Foster*, 6 Allen 136. See also *Parker v. Kane*, 4 Allen, 346.—*Ames v. Foster*, 3 Allen 541.

*"Carry on any trade or business," &c.* None of the prop-

erty of which a married woman became possessed by the statute of 1845 could be employed by her in trade or commerce, but the statute declared that it must be invested in United States stocks, state stocks, corporation stocks, personal securities, or in furniture in her actual use and occupation. St. 1845, c. 208, s. 10. By the statute of 1855, however, she was allowed to carry on any trade or business and perform any labor or services on her sole and separate account, and all her earnings became her sole and separate property. St. 1855, c. 304, s. 3.

When a married woman does business on her separate account, she must file a certain certificate to that effect in the clerk's office of the city or town in which she resides, otherwise the property employed in such business will be liable for her husband's debts. If the wife fails to file the certificate, the husband must do so, or he will be liable on all contracts made in the prosecution of the business, in the same manner as if they were made by himself. St. 1862, c. 198.

The court declared in 1862 that the statute of 1855, confirmed by the General Statutes, allowed a married woman to form a partnership with any person except her husband. *Plumer v. Lord*, 5 Allen 460. But a statute was passed in 1863, declaring that the former statutes should not be so construed as to allow a married woman to enter into copartnership with any person. St. 1863, c. 165.

A married woman may keep boarders on her sole and separate account, although her husband lives with her, and she will be liable for all goods purchased in carrying on the business; but if the goods are once charged to the husband, she will not be held liable for them. *Parker v. Simonds*, 1 Allen 258. If, however, it is shown that the husband and wife live together, and that the house is his, in the absence of evidence that she carried on the business separately, she will be considered his agent. *Commonwealth v. Coughlin*, 14 Gray 389. Her own acts and admissions concerning the matter are competent evidence against her. *Parker v. Simonds*, 1 Allen 258.



It has been held that the wife of a person whose property has been attached on a writ, may be employed by the attaching officer as keeper of the property, and that the attachment will not thereby be dissolved. *Farrington v. Edgerly*, 13 Allen 453.

*"Perform any labor or services on her sole and separate account."* As to the circumstances under which a married woman's trade, &c., is held to be carried on "on her sole and separate account," see *Burke v. Cole*, 97 Mass. 113. — *Parker v. Simonds*, 1 Allen 258.

*"Sue and be sued."* Where the property sued for is the separate property of the wife, the action must be in the name of the wife only. *Hennessey v. White*, 2 Allen 48. Where, however, a wife brings a bill in equity, it is not improper for her husband to join, on the ground that he is her natural protector. *Burns v. Lynde*, 6 Allen 305.

If the husband joins with the wife in making a mortgage of her separate real estate, she is not obliged to make him a party to a bill in equity to redeem. *Conant v. Warren*, 6 Gray 562.

In an action against a married woman it is not necessary to assert in the declaration that the defendant is a married woman, or that the action concerns her separate property alone, but it is enough that these facts appear on the trial, and the burden of proof is on the plaintiff to show such facts as will make the defendant liable in the action. *Van Buren v. Swan*, 4 Allen 380. — *Blake v. Sawin*, 10 Allen 340. — *Gregory v. Pierce*, 4 Met. 478. — *Tracy v. Keith*, 11 Allen 214.

A married woman is liable on a note, signed by her jointly with her husband, and given in payment for materials designed for and actually used in repairing buildings belonging to her as her sole and separate property. *Parker v. Kane*, 4 Allen 346.

A married woman will not be liable to an action at law except upon "matters having relation to her separate property." In some cases however, where a contract is for her personal benefit, or where she expressly makes a debt a charge

upon her separate property, a suit in equity may lie to enforce the claim against her estate, though such claim has not the relation required by the statute. But where she is a mere surety, or makes a contract for the accommodation of another without consideration received by her, not only will the contract be void at law, but equity will not enforce it against her estate, unless an express agreement makes the debt a charge upon it. *Willard v. Eastham*, 15 Gray 328, 334, 335. — *Rogers v. Ward*, 8 Allen 387.

Further, as to suits brought by or against a married woman, see Gen. St. c. 124, s. 7. — Gen. St. c. 168, s. 6. — Gen. St. c. 161, s. 6. — Gen. St. c. 86, s. 38. — Gen. St. c. 69, s. 1.

*"But no conveyance by her," &c.* Under the statute of 1845, a conveyance of separate property by a married woman, in which the husband did not join, was valid, but the husband's rights as tenant by the curtesy remained intact. *Beal v. Warren*, 2 Gray 447, 457. The statutes of 1855 and 1857, like the General Statutes, declared the deed void unless the husband assented to or joined in the conveyance. By the common law the separate deed of a married woman is absolutely void. *Silaby v. Bullock*, 10 Allen 94. — *Beal v. Warren*, 2 Gray 447. *Concord Bank v. Bellis*, 10 Cush. 276. — *Jewett v. Davis*, 10 Allen 71.

A joint deed of husband and wife in the common form is sufficient to convey the wife's separate real estate (*Bartlett v. Bartlett*, 4 Allen 440), and the wife as well as the husband is liable on the covenants in such deed. *Basford v. Pearson*, 7 Allen 504.

As to what will constitute a sufficient "assent in writing" of the husband, see *Hills v. Bearse*, 9 Allen 403.

Admissions made by a married woman, without the assent of her husband, are not competent evidence to prove a right of way over her land. *McGregor v. Wait*, 10 Gray 72.

A woman who, during coverture, has executed a deed of her sole and separate real estate for a valuable consideration, but

without the assent of her husband in writing, cannot, after her husband's death, be compelled by a court of equity to execute a new and valid deed to the grantee, although the husband orally assented to the original deed. *Townsley v. Chapin*, 12 Allen 476.

A married woman may mortgage her separate real estate to secure a debt of her husband, though she has no interest in the debt. *Bartlett v. Bartlett*, 4 Allen 440.

A married woman, who executed a deed of her real estate bearing date previously to her marriage, by the name which she then bore, with the fraudulent purpose of imposing upon some person to be affected by it, and without disclosing the fact of her marriage, has been held not to estop herself and her heirs thereby from setting up title in the land as against her grantee or against a purchaser from him without notice. *Lowell v. Daniels*, 2 Gray 161.

SECT. 4. It seems that a married woman may, without the intervention of the court, place her property in the hands of a third party as trustee for her. *Farrelly v. Ladd*, 10 Allen 127.

As to the manner in which a married woman can dispose of the income of funds held in trust for her, see St. 1864, c. 198, and St. 1864, c. 276.

SECT. 5. If a married woman doing business on her sole and separate account, does not file a certain certificate in the city or town clerk's office, her property will be liable for her husband's debts, and moreover, if the wife does not file such certificate, and the husband fails to do so, he will be liable upon all contracts lawfully made in the prosecution of such business, in the same manner and to the same extent as if they had been made by himself. St. 1862, c. 198. Under the preceding statute it has been held that a boarding-house keeper must file a certificate in order to secure the furniture against her husband's creditors. *Chapman v. Briggs*, 11 Allen 546.

SECT. 8. Previous to 3d June, 1855, the husband, upon

marriage, became liable according to the common law for the obligations contracted by the wife before coverture. His liabilities ceased with his death, and did not descend to his representatives, and his wife, if alive, became again responsible for the payment of her debts. 1 Parsons on Contracts 286.

SECT. 9. In 1842, a married woman was permitted to devise with the assent of her husband, and in 1850 she was permitted to devise to him without his assent. Her present powers were given by St. 1855, c. 304, s. 5, and by St. 1857, c. 249, s. 4.

With the husband's consent in writing, a married woman's will is effectual to pass all her real and personal estate. *Silby v. Bullock*, 10 Allen 94.

A married woman may make a valid disposition of specific articles of her separate personal property by a donatio causa mortis without her husband's consent, such disposition not being considered as testamentary, but as a gift. *Marshall v. Berry*, 13 Allen 43.

See St. 1864, c. 198, and St. 1864, c. 276.

SECT. 10. "*Or authorize the husband to convey.*" Though a husband cannot convey real estate directly to his wife, he may, notwithstanding this provision, do so indirectly through a third party. *Motte v. Alger*, 15 Gray 322, 323.

"*Or give property to his wife.*" See *Baxter v. Knowles*, 12 Allen 116.

"*Or destroy or impair his rights as tenant by the curtesy.*" A married woman may, by a will duly executed with her husband's written assent, dispose of all her real estate, so as to cut off his rights as tenant by the curtesy. *Silby v. Bullock*, 10 Allen 94.

SECT. 26. This section was repealed and superseded by St. 1862, c. 116.

*Marriage Contracts.*

SECT. 27. In 1845, power was given to a wife to continue to hold, by the terms of a marriage contract made in writing

before marriage, the property of which she was possessed at the time of marriage. St. 1845, c. 208, ss. 1, 2.

*"The parties may enter into a contract," &c.* If the wife by an ante-nuptial contract agrees to accept certain provisions in lieu of all other claims upon her husband's estate, the contract will be a bar to dower, but such a contract will not at law be a bar to a distributive share in the personal estate of the husband, since such an estate is wholly indefinite, and under the husband's control. *Sullings v. Richmond*, 5 Allen 187. Equity may, however, decree a specific performance of such a contract. *Sullings v. Sullings*, 9 Allen 234. — *Tarbell v. Tarbell*, 10 Allen 278.

See *Lawrence v. Bartlett*, 2 Allen 36. — *Bullard v. Briggs*, 7 Pick. 533. — *Miller v. Goodwin*, 8 Gray 542.

SECT. 28. *"If not so recorded the contract shall be void."* No marriage contract made before 18th May, 1867, between parties both of whom were then living, and no marriage contract made after that date, is invalid as between the parties and their heirs and personal representatives, because it is not recorded. St. 1867, c. 248. See *Ingham v. White*, 4 Allen 412.

*Married Women coming from other States.*

SECT. 29. As to the law prior to the statute, see *Gregory v. Paul*, 15 Mass. 31.

*Married Women abandoned by their Husbands, &c.*

SECT. 31. When a person leaves his usual home and place of residence for temporary purposes, and is not heard of or known to be living for the term of seven years, the legal presumption is that he is dead. *Loring v. Steineman*, 1 Met. 204, 211. — *Flynn v. Coffee*, 12 Allen 133.

## CHAPTER CIX.

## OF GUARDIANS AND WARDS.

*Of Minors.*

SECT. 5. "*By his last will in writing.*" Such a will must be duly executed in accordance with the requirements of the statutes in regard to wills. *Wardwell v. Wardwell*, 9 Allen 518.

*Of Insane Persons and Spendthrifts.*

SECT. 8. "*An insane person.*" The words "insane person" include every idiot, non-compos, lunatic, insane, and distracted person. Gen. St. c. 3, s. 7, clause 8.

"*The court shall cause notice,*" &c. If, after due notice, the case is adjourned from time to time, it will not be necessary to the validity of a decree appointing a guardian that another notice should be given to the insane person as to the time when the decree is to be entered. *Davison v. Johonnot*, 7 Met. 388.

"*That the person in question is incapable of taking care of himself.*" In deciding this point, the court is not restricted to the evidence which is derived from the examination of the person himself. *Brigham v. Brigham*, 12 Mass. 505.

The allegation of insanity is not supported by proof that the person was aged and had squandered his property under the influence of profligate children, though it seems that a guardian may be appointed for such a person on the ground that he is a spendthrift. *Darling v. Bennett*, 8 Mass. 129.

SECT. 9. In a case in which the selectmen, after entering a complaint, took a bond to indemnify the town against any expense on account of the spendthrift or his family, the consideration of which was that all further proceedings should be relinquished, it was held that such bond was void, whether

there was good ground for the complaint or not. *Norton v. Leonard*, 12 Pick. 152.

SECT. 10. After the complaint and order of notice are properly filed, a promise, by one who is subsequently adjudged a spendthrift, to pay a debt which was contracted before the complaint, will not take the debt out of the operation of the statute of limitations. *Manson v. Felton*, 13 Pick. 206. — *Foster v. Starkey*, 12 Cush. 324, 329. Nor under similar circumstances can an adult ratify by a sealed instrument a conveyance of real estate which was made by him while a minor. *Chandler v. Simmons*, 97 Mass. 508.

SECT. 12. It seems that letters of guardianship remain in force, and are conclusive as to the powers and duty of the guardian and the disabilities of the ward, until they are duly avoided by a regular appeal, unless it appears that the judge of probate has exceeded his authority, or has undertaken to determine rights of parties over which he has no jurisdiction, or has proceeded in a course prohibited by law, in either of which cases such letters are only *prima facie* evidence of the propriety of the guardianship. *Smith v. Rice*, 11 Mass. 507. — *Sumner v. Parker*, 7 Mass. 79. — *Conkey v. Kingman*, 24 Pick. 115. — *White v. Palmer*, 4 Mass. 147. — *Leonard v. Leonard*, 14 Pick. 280, 284.

*Of Persons out of the State.*

SECT. 13. "*For any county in which there is any estate,*" &c. Where a part of the property was personal estate, which was held in trust, it was decided that the probate court for the county in which the trustee resided, had jurisdiction of the appointment of a guardian. *Clarke v. Cordis*, 4 Allen 466.

SECT. 14. The rights and powers of a guardian are strictly local being circumscribed by the jurisdiction of the government which clothed him with office. *Woodworth v. Spring*, 4 Allen 321. — *Spring v. Woodworth*, 2 Allen 206. — *Himes v. Howes*, 13 Met. 80.

*General Provisions.*

SECT. 16. "*Every guardian shall give bond with surety or sureties.*" Delivery, express or constructive, is as essential to a guardian's bond as to a deed, in order to bind either the guardian or his sureties. *Fay v. Richardson*, 7 Pick. 91. — *Fay v. Hurd*, 8 Pick. 528.

"*Third. To render an account,*" &c. If a guardian fails to render his accounts as required by the bond, the ward's only remedy is by an action on the bond. *Dawes v. Bell*, 4 Mass. 106. — *Brooks v. Brooks*, 11 Cush. 20, 21. — *Conant v. Kendall*, 21 Pick. 36. — *Moore v. Hazleton*, 9 Allen 102, 105.

The proper method of computing interest in guardian's accounts is somewhat doubtful, but it seems that, if the income exceeds the expenses, a balance should be struck every year, and that the surplus should be carried forward on interest whenever the sum is so large that a person acting faithfully and discreetly would put it into a productive state. In one case five hundred dollars was considered to be the sum which would require investment. *Fay v. Howe*, 1 Pick. 527. — *Miller v. Congdon*, 14 Gray 114. — *Boynton v. Dyer*, 18 Pick. 1. In a case where a guardian settled two accounts in the probate court without charging himself with interest, it was held that on the presentation of the third account he might be charged with interest from an early date after his appointment, in the same manner as if no previous account had been settled, provided that the question of interest had not been put in issue and decided on the settlement of the former accounts. *Boynton v. Dyer*, 18 Pick. 1.

Damages for a tort committed by the ward against his guardian cannot be allowed in the account. *Brown v. Howe*, 9 Gray 83.

"*Fourth. At the expiration of his trust to settle his accounts,*" &c. If, by collusion between the guardian and ward, a final account is settled in the supreme court, which account is fraudu-



lent and void as against the sureties, the guardian cannot be cited anew by the ward before the judge of probate to settle a correct account, but both he and the ward will be bound by the account as settled. *Baylies v. Davis*, 1 Pick. 206.

The settlement of an account out of court by a ward on his coming of age does not prevent him from afterwards, within a reasonable time, citing the guardian to render an account before the judge of probate, for the court regards with the strictest scrutiny any such settlement made out of court. *Moore v. Hazleton*, 9 Allen 102, 105. — *Wade v. Lobdell*, 4 Cush. 510. — *Boynton v. Dyer*, 18 Pick. 1. — *Bard v. Wood*, 3 Met. 74.

Inasmuch as it may happen that other persons must take the place of the guardian in settling his final account, for instance when a guardian dies, the statutes do not require it to be settled upon oath, but it seems that the court may in its discretion compel an answer upon oath to all proper interrogatories respecting the account and the items thereof. *Curtis v. Bailey*, 1 Pick. 198. — *Wade v. Lobdell*, 4 Cush. 510.

After the death of the guardian, the ward's property is held by his administrator, not as effects to be administered upon, but rather as a bailment for its preservation until an account can be settled in the probate court. The administrator is the usual and proper person to present the deceased guardian's account for settlement, but the sureties on the guardian's bond may present it, and they are not discharged from their liability as such sureties, although the account is not settled until after the right of action against the administrator is barred by the statute of limitations. *Chapin v. Livermore*, 13 Gray 561. It has even been held that the administrator of one of the sureties may present the account for settlement. *Curtis v. Bailey*, 1 Pick. 198.

SECT. 17. "*Shall account for,*" &c. A guardian is chargeable with and must account for the rent of real estate of his

ward which was occupied by him before his appointment. *Mattoon v. Cowing*, 13 Gray 387.

SECT. 18. "*Every guardian shall pay all just debts,*" &c. If the guardian, having assets, refuses to pay a debt of the ward's, the creditor may maintain an action on the guardianship bond, but it is doubtful whether the debt must not first be ascertained by a judgment. *Conant v. Kendall*, 21 Pick. 36. — *Cole v. Eaton*, 8 Cush. 587. The property of the ward is also subject to attachment by trustee process, and may be taken on execution. *Hicks v. Chapman*, 10 Allen 463. — *Whitcomb v. Jacobs*, 9 Gray 255. It was even held, in the case of a non-compos under guardianship, that he might be committed on execution. *Ex parte Leighton*, 14 Mass. 207. But see, contra, *Conant v. Kendall*, 21 Pick. 36.

If a guardian within the six years promises to pay a debt created by the ward before he was put under guardianship, such a promise will take the debt out of the statute of limitations. *Manson v. Felton*, 13 Pick. 206. — *Foster v. Starkey*, 12 Cush. 324, 329.

When a mortgagee entered for condition broken, and was subsequently put under guardianship as a spendthrift, it was held that the guardian could restore the possession of the land to the mortgagor, and thereby prevent foreclosure. *Botham v. McIntier*, 19 Pick. 346.

If the ward is a minor, and has entered into a contract which would be voidable by him on his coming of age, it cannot be avoided by the guardian, especially if it is beneficial to the ward; but it is questionable whether the guardian would be justified in fulfilling such a contract on behalf of the ward by paying money or otherwise. *Oliver v. Houdlet*, 13 Mass. 237. But the deed of a minor may be avoided, after he becomes of age, by a guardian appointed over him as a spendthrift. *Chandler v. Simmons*, 97 Mass. 508, 511.

"*And he shall appear for and represent his ward in all legal suits.*" Since the guardian has merely a naked power, not

coupled with an interest, all suits in relation to the ward or to his property must be brought and defended by him in the name of the ward. *Hicks v. Chapman*, 10 Allen 463, 464. And a ward cannot in his own name alone, and without the concurrence of the guardian, institute any civil action, not even an action against his guardian for assault and battery. Perhaps, however, an infant may by a *prochein ami* prosecute a suit against his guardian. *Mason v. Mason*, 19 Pick. 506.

It seems that a guardian cannot, during the guardianship, bring any action against his ward. *Brown v. Howe*, 9 Gray 84.

If the interest of the guardian in any suit is adverse to that of his ward, it becomes the duty of the court, before hearing the cause, to appoint a guardian *ad litem*. *Mitchell v. Kingman*, 5 Pick. 431. — *Davenport v. Davenport*, 5 Allen 464. — *Denny v. Denny*, 8 Allen 311.

SECT. 19. "*He shall manage the estate,*" &c. The guardian in managing the estate must act in good faith, and exercise a sound discretion; otherwise he will be personally liable for any losses which may occur. *Lowell v. Minot*, 20 Pick. 116. — *Clark v. Garfield*, 8 Allen 427. — *Harding v. Larned*, 4 Allen 426.

"*And apply the income and profits thereof,*" &c. It has been held that fancied enjoyments, luxuries, and even harmless caprices are to be indulged up to the limits of the income, and that for solid enjoyments and substantial comforts the court may even allow the guardian to encroach on the principal. *Kendall v. May*, 10 Allen 59, 67.

*Additional powers of guardians.* Probate courts, after notice to all persons interested, may authorize guardians to purchase the release of any right of dower, homestead, life-estate, estate for years, &c., or any interest, vested or contingent, held by any person in any real estate of their wards, &c., &c., and also to bind the said estates of their wards by mortgage or otherwise for the purpose aforesaid, when it shall appear to the

court to be for the ward's interest. St. 1869, c. 219, s. 1. As to the form and effect of the mortgage, see St. 1869, c. 219, s. 2.

For further provisions empowering probate courts in certain cases to authorize guardians to mortgage the real estate of their wards, see St. 1864, c. 212, and St. 1869, c. 451.

A female minor, who has attained the age of eighteen years, may join with her guardian in making a marriage contract, &c., and for such purpose the guardian and ward may convey the real and personal estate of the ward to trustees, &c. St. 1869, c. 292.

SECT. 20. "*And set-off dower.*" If, however, a guardian submits to arbitration the sum which an infant ward shall pay a widow in lieu of dower, the award is voidable on the infant's coming of age. *Barnaby v. Barnaby*, 1 Pick. 221.

See St. 1864, c. 212, and Gen. St. c. 63, s. 24.

SECT. 21. "*If a minor who has a father living.*" If the minor's father is dead, neither his mother, nor his father-in-law is required to support him, provided he possesses property in his own right sufficient for his maintenance. *Whipple v. Dow*, 2 Mass. 415. — *Dawes v. Howard*, 4 Mass. 97. — *Cole v. Eaton*, 8 Cush. 587.

SECT. 22. Prior to statutory provision on this subject, the guardian had general authority to sell any personal property of his ward, and though he might make the sale improperly, a bona fide purchaser would have a good title. *Ellis v. Essex Merrimack Bridge*, 2 Pick. 243. As to the validity, under the present statutes, of a sale or transfer of personal property of his ward, made by a guardian without license, see *Atkinson v. Atkinson*, 8 Allen 15, 19.

SECT. 23. This section after having been amended by St. 1861, c. 130, was repealed and superseded by St. 1862, c. 139, s. 1, which last statute was itself repealed and superseded by St. 1866, c. 122.

SECT. 24. "*Or otherwise incapable of discharging his trust,*"

&c. Want of capacity may arise from any physical, mental, or moral infirmity or defect, and unsuitableness refers to any unfitness arising out of the situation of the guardian in connection with the estate of his ward, as by reason of his being indebted to it, or having claims upon it, or interest in it under a will or as heir-at-law. A wide discretion is given to the judge of probate in deciding upon the capability or suitableness of a guardian. *Thayer v. Homer*, 11 Met. 104, 110.

*"Another may be appointed in his stead."* The ward is entitled to notice upon proceedings for the appointment of a new guardian. *Allis v. Morton*, 4 Gray 63.

After a guardianship is dissolved, the interest of two or more guardians remains joint as to any remedies to which they may be entitled on account of any joint transaction founded upon their relation to the ward. *Shearman v. Akins*, 4 Pick. 283.

As the guardianship is a personal trust, it was held in a case where the selectmen of a town were appointed guardians of a spendthrift, that they did not cease to be guardians upon the expiration of their term of office. *Russell v. Coffin*, 8 Pick. 143.

SECT. 25. *"When a female guardian marries, \* \* \* the marriage shall extinguish her authority."* The law altered in this respect,—marriage not to have this effect, provided, &c. St. 1869, c. 409, s. 2.

SECT. 26. *"But not to her property."* Under the Revised Statutes the guardian was fully discharged by the marriage of his female minor ward. See *Bartlett v. Cowles*, 15 Gray 445.—Commissioners' Rep. on Gen. St., notes on c. 109, s. 27.

SECT. 27. *"A new bond."* Instead of a single bond with joint sureties, there may be several bonds with sureties on each. *Loring v. Bacon*, 3 Cush. 465.

SECT. 28. Neither the ward nor any other person interested in the estate can maintain an action in his own name, either in law or in equity, but only in the name of the judge of probate

who is the obligee. *Grout v. Harrington*, 19 Pick. 403. — *Conant v. Kendall*, 21 Pick. 36.

SECT. 29. "*From the time the guardian is discharged.*" The guardian is discharged whenever the guardianship is in any way effectually determined and brought to a close. *Loring v. Alline*, 9 Cush. 69.

This section applies as well to a bond given upon obtaining a license to sell, as to a general guardianship bond. *Loring v. Alline*, 9 Cush. 69.

See also *Chapin v. Livermore*, 13 Gray 561.

SECT. 30. It seems that a ward can make a complaint under this section in his own name alone. *Sherman v. Brewer*, 11 Gray 210.

SECT. 31. By the common law, the guardian's trust is one of obligation and duty only, and not one of speculation and profit. The guardian can neither reap any profit from the use of the ward's estate, nor act for his own benefit in any contract, purchase, or sale thereof, nor will the due execution of the trust subject the guardian to any loss. *Fisk v. Lincoln*, 19 Pick. 473, 476.

## CHAPTER CX.

### OF THE ADOPTION OF CHILDREN AND CHANGE OF NAMES.

#### *Adoption of Children.*

SECT. 2. For a provision in regard to the adoption of a child above the age of twenty-one years, see St. 1869, c. 189.

SECT. 3. For statutory provisions in relation to the adoption of a child whose parents are *unknown*, see St. 1864, c. 213.

SECT. 4. For a provision in regard to the adoption of a child above the age of twenty-one years, see St. 1869, c. 189.

## CHAPTER CXI.

## OF MASTERS, APPRENTICES, AND SERVANTS.

The bounty and pay of a minor enlisted in the military or naval service of the United States is not subject to legal process on account of debts due from his parent, and the transfer of such bounty or pay by the parent to such minor is not to be deemed fraudulent as to creditors. St. 1865, c. 235.

SECT. 3. "*The minor's consent shall be expressed in the indenture and testified by his signing the same.*" The simple insertion of the name of the minor in the attestation clause of the indenture, and the execution of the instrument by him, will not be a sufficient compliance with this provision. *Harper v. Gilbert*, 5 Cush. 417.

SECT. 4. "*By the overseers of the poor.*" The overseers, when acting under this section, are public officers, and not the agents of the city or town. *New Bedford v. Taunton*, 9 Allen 207.

SECT. 5. "*Females to the age of eighteen years, or to the time of their marriage within that age, and males to the age of twenty-one years.*" They cannot be bound for a less time. *Reidell v. Congdon*, 16 Pick. 44.

"*And provision shall be made,*" &c. If this provision is omitted, the contract is void. *Butler v. Hubbard*, 5 Pick. 250. — *Parsons v. Trask*, 7 Gray 473, 477. A contract which made provision only for teaching "all that was usually taught in the town school" was held void under this section. *Reidell v. Congdon*, 16 Pick. 44.

The indenture of apprenticeship is void if the person who undertakes to bind the minor has no authority so to do, and in such case it seems that the court will not afford any remedy to either party against the other. *Butler v. Hubbard*, 5 Pick. 250, 256.

SECT. 6. Bonds must also be given by the parent or guardian, and by the master. See St. 1865, c. 270, ss. 1, 2.

Although no place of service is specified in the indenture, yet it will be held both, under the statute and under the common law, that the services are to be performed in this commonwealth. *Lobdell v. Allen*, 9 Gray 377.

SECT. 18. This section is repealed by St. 1865, c. 270, s. 3.

SECT. 19. This section is repealed by St. 1865, c. 270, s. 3.

SECT. 20. This section is repealed by St. 1865, c. 270, s. 3.

SECT. 23. As to what are the principal characteristics by which an apprenticeship or service under the common law is distinguished from one under the statute, see *Day v. Everett*, 7 Mass. 145. See also *Lobdell v. Allen*, 9 Gray 377.





## PART III.

---

### OF COURTS AND JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES.

---

#### TITLE I.

#### OF COURTS AND JUDICIAL OFFICERS.

---

#### CHAPTER CXII.

#### OF THE SUPREME JUDICIAL COURT.

SECT. 3. See *Mendon v. County Commissioners of Worcester*, 2 Allen 463, 465.

SECT. 4. As to the form of proceedings under this section, see *Commonwealth v. Cooley*, 1 Allen 358. — *Bullock v. Aldrich*, 11 Gray 206.

SECT. 6. “*Makes oath or affirmation.*” As to the form of such oath or affirmation, see *Lincoln v. Taunton Copper Manufacturing Co.*, 11 Cush. 440.

SECT. 8. Section 3 of chapter 160, requiring that “the degree of murder shall be found by the jury,” does not limit the power of one justice to award sentence under this section. *Green v. Commonwealth*, 12 Allen 155, 169. — *Opinion of Justices*, 9 Allen 585.

SECT. 10. The power of a single justice to reserve questions of law under this section “is a power resting in the exercise of a sound discretion, which the whole court will in no degree

revise or control. Nor ought it to be used unless the questions are of so grave or doubtful a nature as, in the opinion of the presiding judge, to require further consideration, or the case is of a nature to render such a mode of determining the questions of law involved in it expedient or necessary for the final disposition of the cause. In all other cases the right to allege and file exceptions to any ruling, order, or direction of the court affords ample opportunity to all parties to obtain the adjudication of the court of last resort on every question which may be material to the determination of their rights." Per BIGELOW, C. J., in *Phillips v. Soule*, 6 Allen 150, 151.

SECT. 11. As to the time for entry of appeals, exceptions, &c., under this section, see chapter 115, section 12; also section 33 of this chapter.

The supreme court, upon deciding any questions brought before it under this section, may remove the record of the case into that court, may order a new trial there, &c. &c. St. 1866, c. 220.

SECT. 13. For cases where double costs have been awarded under this section, see *Carter v. Smith*, 9 Cush. 321. — *Elder v. Thompson*, 13 Gray 91. — *Williams v. Greene*, 2 Cush. 465.

SECT. 16. If an appeal or exception is not entered in the supreme court, the superior court cannot enter final judgment, but the only remedy is by obtaining an affirmation of the original judgment by complaint under this section. *Gassett v. Cottle*, 10 Gray 375.

SECT. 26. Law questions arising in the counties of Bristol, Essex, and Plymouth are now to be entered at law terms for those counties. See notes to next section.

SECT. 27. Law term for the county of *Berkshire* to be held at Pittsfield on the second Tuesday of September. St. 1868, c. 325, s. 1. — St. 1861, c. 99, s. 1.

Law terms for counties of *Franklin* and *Hampshire*, provided for in this section, abolished, and one term for both those counties established, — to be held alternately at Greenfield and

Northampton on the Monday next after the second Tuesday of September, the odd years at Greenfield. St. 1861, c. 99, s. 2.

Law term for *Bristol* to be held at Taunton, annually, on the fourth Tuesday of October. St. 1861, c. 206.

Law term for *Plymouth* to be held at Plymouth, annually, on the third Tuesday of October. St. 1862, c. 215.

Law term for *Essex* to be held at Salem, annually, on the first Tuesday of November. St. 1868, c. 168.

"*And for all purposes for which a court may be held by a single justice.*" This clause inserted apparently by reason of decision in *Buck v. Wolcott*, 13 Gray 268.

SECT. 28. Jury term for *Berkshire* to be held at Pittsfield, instead of Lenox. St. 1868, c. 325, s. 1.

For *Bristol*, at Taunton, on third Tuesday of April, and at New Bedford on second Tuesday of November, instead of as provided in this section. St. 1860, c. 210, ss. 1, 2.

For *Essex*, additional term at Salem, on first Tuesday of November. St. 1860, c. 210, s. 1.

For *Middlesex*, additional term at Cambridge, on third Tuesday of October. St. 1860, c. 210, s. 1.

SECT. 33. See section 11 of this chapter.

SECT. 34. See St. 1864, c. 111, s. 1, last clause.

SECT. 40. Salary of chief justice raised to \$5,500, and of associate justices to \$5,000. St. 1866, c. 46.

## CHAPTER CXIII.

### OF THE SUPREME JUDICIAL COURT. — EQUITY JURISDICTION.

Regulation regarding the granting of injunctions applied for by public officers against corporations. St. 1862, c. 131.

Certain suits in equity to survive the death of a party. St. 1865, c. 42.

Provisions of Gen. St. c. 149, s. 46–57, concerning interrog-

atories to parties, made applicable to suits in equity. St. 1862, c. 40.

The supreme court has not jurisdiction in equity to make a decree in personam against a defendant who never has been an inhabitant of the state, and has not been served with process within the state. *Moody v. Gay*, 15 Gray 457.

SECT. 2. "*When the parties have not a plain, adequate, and complete remedy at the common law.*" See *Ballou v. Hopkinton*, 4 Gray 324. See also cases cited in note with reference to this subject at the end of this section.

A bill in equity must negative the possibility of such remedy at law, or it will be liable to demurrer. *Travis v. Tyler*, 7 Gray 146.

"*Suits and proceedings for enforcing and regulating the execution of trusts.*" Such trusts, if not arising by implication of law, must be evidenced by agreement in writing. *Walker v. Locke*, 5 Cush. 90.

Under this clause the court has no jurisdiction in equity to enforce a trust arising under the will of a foreigner, which has been proved and allowed in a foreign country only, and of which no certified copy has been filed in the probate court here. *Campbell v. Wallace*, 10 Gray 162.

But the residence of the trustee and cestui que trust out of the state does not take away the power of the court to regulate and control the proper administration of trust estates which are created by wills made by citizens of this state, and which have been proved and established in the courts of this commonwealth. *Chase v. Chase*, 2 Allen 101, 104.

As to suits brought by trustees for instructions as to their duty as such, see *Drury v. Natick*, 10 Allen 169, 175.

"*Suits for the specific performance of written contracts.*" See *Miller v. Goodwin*, 8 Gray 542. See also chapter 117, section 5.

Whether upon decreeing specific performance of a contract to convey lands to one since deceased, his widow will be enti-

bled to her dower therein, quære, see *Reed v. Whitney*, 7 Gray 533. — *Lobdell v. Hayes*, 4 Allen 187.

*"Suits to compel the redelivery of goods," &c.* Notes and other securities are "goods and chattels," within the meaning of this provision. *Clapp v. Shephard*, 23 Pick. 228, 230. — *Gibbens v. Peeler*, 8 Pick. 254. — *Mills v. Gore*, 20 Pick. 28.

In order to maintain a suit under this provision, the goods and chattels, the redelivery of which is sought, must be such as the plaintiff might maintain an action at law to recover, if they could be found so as to be replevied. *Pool v. Lloyd*, 5 Met. 525, 528. — *Clapp v. Shephard*, 2 Met. 127, 131.

As to the extent to which the plaintiff must allege in his bill the facts showing his title to the property sought to be recovered, see *Strickland v. Fitzgerald*, 7 Cush. 530, 532. — *Clapp v. Shephard*, 23 Pick. 228, 231.

"It is not necessary, to lay a foundation for this process, that a writ of replevin should first be taken out, and that the officer should return on it that he could not obtain possession of the goods or papers." — "It is enough that it shall appear to the court by the facts stated in the bill, admitted, or proved, that the goods or papers sought to be delivered up, were so controlled by the defendant that an attempt to replevy them would probably be fruitless." *Gibbens v. Peeler*, 8 Pick. 254, 258. So also in *Mills v. Gore*, 20 Pick. 28, it was said that "The demand of the papers, and the refusal to deliver them, conclusively prove that they have been detained and withheld within the meaning of the statute. The plaintiffs were not bound to try an experiment, which might prove ineffectual, by suing out a writ of replevin and causing a new demand to be made by an officer."

As to the effect of an offer, made after the bill is filed, to produce the property to an officer so that it can be replevied, see *Gibbens v. Peeler*, 8 Pick. 254, 259.

"It is no objection to the maintenance of a suit under this provision that the plaintiff might maintain an action of tort in

the nature of trover for the tortious taking of the property sought to be recovered, or that the defendant might be sued by the plaintiff in an action of contract. *Clapp v. Shephard*, 23 Pick. 228, 230.

*"Other cases in which there are more than two parties having distinct rights," &c.* For cases arising under this clause, see *Hubbell v. Currier*, 10 Allen 333. — *Clark v. Jones*, 5 Allen 379. — *Scovill v. Kinsley*, 13 Gray 5.

*"Bills by creditors to reach," &c.* A creditor may sustain a bill under this provision without first establishing his debt by a judgment at law. *Crompton v. Anthony*, 13 Allen 33, 37.

Such bill may be maintained by one creditor alone in his own behalf, and need not, even though the debtor be insolvent, be brought for the benefit of the other creditors. *Silloway v. Columbia Ins. Co.*, 8 Gray 199. — *Crompton v. Anthony*, 13 Allen 33, 37.

Under this provision a creditor, whose debtor resides out of the state, may attach notes belonging to such debtor and in the hands of his agent in this state. *Davis v. Worden*, 13 Gray 305.

But he cannot charge as trustee one who is liable to his debtor on a negotiable note held by such debtor or by some third person, it being uncertain who is the holder of the note at the time. *Sawyer v. Bancroft*, 12 Gray 365, 366.

A creditor of one who has obtained a judgment for damages may maintain a bill under this clause to compel payment of his debt from the proceeds of such judgment. *Rice v. Stone*, 1 Allen 566, 572. See also *Moody v. Gay*, 15 Gray 457.

*"Cases of accident and mistake."* For a case in which the court reformed and corrected a deed under this clause, see *Canedy v. Marcy*, 13 Gray 373.

*"And in all other cases where there is not a plain, adequate, and complete remedy at law."* The remedy at law here referred to is such as exists "under our statutes and according to our course of practice. This may exclude some of the

cases where the English courts of equity take jurisdiction, especially cases involving fraud." Per CHAPMAN, J., in *Pratt v. Pond*, 5 Allen 59, 60.

Among the "other cases" referred to in this clause, are those where persons wrongfully detain and withhold deeds or other written instruments from those who have a right to the possession of them. *Pierce v. Lamson*, 5 Allen 60, 61.

Where a party can establish his title to real estate by writ of entry, he cannot maintain a bill in equity for the purpose of obtaining a release or reconveyance from the party in whom the title stands of record. *Metcalf v. Cady*, 8 Allen 587, 589. — *Pratt v. Pond*, 5 Allen 59. — *Peabody v. President & Fellows of Harvard College*, 10 Gray 283, 284.

But where a *reversionary* interest in real estate is in dispute, as a writ of entry cannot be maintained, the proper remedy will be by bill in equity. *Martin v. Graves*, 5 Allen 601, 602. — *Hall v. Whiston*, 5 Allen 126, 130.

The remedy by quo warranto under Gen. St. c. 145, s. 16, is not so adequate and complete as to prevent the court from taking jurisdiction in equity of a complaint for injury to private rights or interests from the exercise by a private corporation of a franchise or privilege not conferred by law. *Fall River Iron Works v. Old Col. & Fall River R.R.*, 5 Allen 221, 225.

SECT. 3. When a suit in equity is commenced by bill or petition with a writ of subpoena, or inserted in an original writ, the court has power to grant a writ of ne exeat against the defendant, in a proper case, according to the course of practice in chancery. *Rice v. Hale*, 5 Cush. 238.

SECT. 5. Where a defendant, instead of filing a formal demurrer, inserts in his answer a statement in the nature of a demurrer under Rule 38 of the chancery rules of the supreme court, no certificate that it is not intended for delay is required. *Mill River Loan Fund Ass. v. Claffin*, 9 Allen 101.

SECT. 8. Under this section an appeal lies from the deci-



sion of a single judge in matter of fact as well as of law. *Wright v. Wright*, 13 Allen 207.

SECT. 16. "*Shall bear date as of the day when the same is actually entered by the clerk.*" That is, the day when the clerk enters the decree on his docket and places it on file, and the decree will take effect from such day whether in term time or vacation. But "no decree can be said to be entered of record until it is formally drawn out and filed by the clerk. A mere order for a decree, before it is extended in due form and apt and technical language, cannot be held to be a complete record of the judgment of the court." *Thompson v. Goulding*, 5 Allen 81, 84.

## CHAPTER CXIV.

### OF THE SUPERIOR COURT.

SECT. 3. "*The court shall have exclusive original jurisdiction of complaints for flowing land.*" Such complaints cannot be removed to the supreme court under sections 7 and 8 of this chapter. *Humphrey v. Berkshire Woollen Co.*, 10 Allen 420.

SECT. 7. This section does not apply to complaints for flowing land. *Humphrey v. Berkshire Woollen Co.*, 4 Allen 420.

SECT. 8. No removal under this section shall be made until the clerk of the supreme court has been paid his entry fee. *St. 1862, c. 115.*

If the defendant, after making the affidavit provided for in this section, fails to have the action duly entered in the supreme court, or to pay the clerk of that court his fee for entry, the action remains within the jurisdiction of the superior court, and is to be proceeded with there. *Rice v. Nickerson*, 4 Allen 66.

SECT. 10. No case can be brought before the supreme court under this section until it has been finally disposed of in the superior court by verdict or judgment. *Bennett v. Clemence*, 3 Allen 431. — *Case v. Ladd*, 2 Allen 130. — *Maher v. Dougherty*, 11 Gray 16.

“*Except judgment upon answers or pleas in abatement.*” A decision upon a demurrer to a plea in abatement comes within the exception. *Willard v. Stone*, 13 Gray 475.

SECT. 12. The supreme court, upon deciding any question brought before it upon appeal, may remove the record of the case into that court, may order a new trial there, &c. St. 1866, c. 220.

SECT. 14. No agreement of counsel can dispense with the transmission of copies as provided in this section. *Williams v. Kenney*, 98 Mass. 142, 143.

SECT. 16. Term for *Barnstable* to be held on second Tuesday of October, instead of first Tuesday of September. St. 1869, c. 354.

Terms for *Berkshire* to be held at Pittsfield instead of Lenox. St. 1868, c. 325, s. 1.

Criminal terms for *Essex* altered by St. 1860, c. 62.

Civil term for *Hampden* to be held on fourth instead of first Monday of October. St. 1868, c. 250.

Terms for *Middlesex*, before held at Concord, to be held at Cambridge. St. 1867, c. 220.

Terms for *Norfolk* altered by St. 1867, c. 105.

Term for *Plymouth* to be held on fourth instead of third Monday of October. St. 1862, c. 215, s. 3.

SECT. 17. When any criminal case is on trial at the end of any term as established by law, such term may be continued, and the jurors required to serve until the case is finished. St. 1863, c. 33.

SECT. 21. See chancery rules of supreme court, rule xxxiv.

SECT. 22. Salary of chief justice raised to \$4,500; of the associate justices to \$4,200. St. 1867, c. 165.

## CHAPTER CXV.

## OF MATTERS COMMON TO THE SUPREME JUDICIAL AND SUPERIOR COURTS.

SECT. 4. Supreme court may make rules regarding the challenging of jurors. St. 1862, c. 84, s. 2.

SECT. 5. Under this section, the court, in charging the jury, is prohibited from expressing any opinion as to the credibility of witnesses. *Commonwealth v. Barry*, 9 Allen 276, 278.

But it is within the province of the judge to call the attention of the jury to the evidence which is in the case, stating his recollection of what that evidence is, but submitting the effect of it to their consideration and judgment. *Eddy v. Gray*, 4 Allen 435, 438.

"A judge may state the testimony, and this can hardly be done without calling the attention of the jury to the degree of weight and importance to be attached to particular facts, if they are proved or admitted. To say that certain circumstances deserve to be seriously considered, or are entitled to great weight, is not expressing an opinion as to what facts have been proved, but only instructing the jury with regard to the relative materiality and importance of different portions of the evidence. To assist and guide the deliberations of the jury by such comments is no infringement upon their province, but often a duty necessary to lead their minds to an enlightened and discriminating consideration of the case." Per FOSTER, J., in *Durant v. Burt*, 98 Mass. 161, 168.

It is not only the province, but the imperative duty of the court to direct the jury to find a verdict for plaintiff or defendant, if such verdict is required by the legal effect of the admitted facts in the case. *Todd v. Old Col. & Fall River R.R.*, 7 Allen 207, 208.

It is rarely, if ever, that a case can arise in which it would be proper for the court to instruct the jury that the existence

of a particular fact conclusively proves fraud. See *Banfield v. Whipple*, 14 Allen 13, 14.

SECT. 6. "*For any cause for which a new trial may, by law, be granted.*" As to what causes are sufficient for this purpose, see *Borrowscale v. Bosworth*, 98 Mass. 34, 36.

"*Or after verdict may report the case,*" &c. "Questions of law, whether arising upon a trial or other proceeding before the superior court, may, by consent of the parties to the suit, be reported *before the verdict* for the determination of the supreme court," &c. St. 1869, c. 438.

Except as provided by the above statute, a case cannot be reported before verdict. *Minot v. Sawyer*, 1 Allen 18.

When parties waive a trial by jury, as there is no verdict, the case cannot be reported at any time, except under the provisions of the above cited St. 1869, c. 438. *Lincoln v. Parsons*, 1 Allen 388.

This section does not authorize the reporting of a case after a verdict on a trial of a plea in abatement. *Stackpole v. Hunt*, 9 Allen 539.

SECT. 7. "*Decisions \* \* \* upon pleas in abatement.*" The decision of a judge of the superior court, however, allowing a plea or answer in abatement to be filed after the time allowed by law, is not final, but exceptions may be taken to such decision. *Hastings v. Bolton*, 1 Allen 529, 531.

"*On motions for a new trial.*" "We cannot suppose that it was intended by this provision to allow a party to present a second time, as matters of law upon a motion for a new trial, all the matters of law which arose or might have arisen during the trial, and upon which no question of law was then made or reserved. Upon motions for new trial new questions of law may arise; and, if the decision of the motion depends or rests upon them, they may be proper subjects of revision by the court above." Per HOAR, J., in *Lowell Gas-Light Co. v. Bean*, 1 Allen 274, 275. See also *Kidney v. Richards*, 10 Allen 419, 420.

No exception lies to a decision upon a motion for a new trial on the ground that the verdict was against evidence, and that the facts which the whole evidence tended to prove were insufficient to authorize the verdict. *Lowell Gas-Light Co. v. Bean*, 1 Allen 274, 275. — *Phillips v. Soule*, 6 Allen 150, 152.

Whether exceptions lie to a decision upon a motion for a new trial on account of an alleged tampering with the jury, *quære*. *Shea v. Lawrence*, 1 Allen 167, 170.

Exceptions will lie to a decision refusing a motion for a new trial grounded on the fact that a paper which had a direct bearing on the issue, but which had been during the trial objected to and rejected as incompetent, was, by direction of the judge, sent to the jury, while they were deliberating on their verdict. *Alger v. Thompson*, 1 Allen 453, 455.

But no exception will lie when the motion is on the ground of newly discovered evidence, in which questions of fact as well as of law are involved. *Gifford v. Brownell*, 2 Allen 534.

*"And in all cases, civil or criminal, whether according to the course of the common law or otherwise."* See *Eaton v. Hall*, 5 Met. 287, 289. — *Davenport v. Holland*, 2 Cush. 1, 11.

*"A party aggrieved by an opinion, ruling, direction, or judgment of the court in matters of law."* In jury trials in the superior court all decisions upon questions of law, raised during the progress of the trial, are to be immediately reduced to writing, and all instructions to the jury upon such questions are to be reduced to writing before the jury retire, &c. St. 1863, c. 180, s. 1. — St. 1864, c. 214.

A party cannot except to an erroneous instruction given at his own request. *Dennis v. Maxfield*, 10 Allen 138, 143.

It has been held to be good ground for exception, that a judge refused to rule that certain evidence, if believed, would have a certain effect in law. *Kent v. Warner*, 10 Allen 561, 563.

So also where the judge refused to instruct the jury that the evidence was insufficient in law to support a verdict. *Denny v. Williams*, 5 Allen 1, 4, 9. See, however, *Cox v. Cook*, 14

Allen 165, 166. But not where the judge refused, at the conclusion of the plaintiff's evidence, to give such instruction unless the defendant would rest his case there. *Manning v. Albee*, 14 Allen 7. — *McMahon v. Tyng*, 14 Allen 167, 169.

But in the following cases it has been held that no exception would lie: —

Where a single judge had discharged a prisoner on habeas corpus. *Wyeth v. Richardson*, 10 Gray 240.

Where the judge restricted cross-examination on immaterial matters. *Hutchinson v. Methuen*, 1 Allen 33.

Where the judge admitted incompetent evidence, if he afterwards instructed the jury to disregard it. *Smith v. Whitman*, 6 Allen 562, 564.

Where he refused to recommit an auditor's report. *Kendall v. Weaver*, 1 Allen 277.

Where he refused to require the plaintiff to elect upon which of two counts, alleged to be for the same cause of action, he would proceed in the trial. *Sheffield v. Van Deusen*, 15 Gray 485.

Where he refused to reserve the case on questions of law under Gen. St. c. 112, s. 10. *Phillips v. Soule*, 6 Allen 150, 151.

The decision of a judge as to the extent to which the re-examination of a witness on matters not testified of in cross-examination may be carried, is not subject to exception. *Kendall v. Weaver*, 1 Allen 277.

As to the extent to which the decision of a judge as to the relevancy of interrogatories to a deponent is subject of exception, see *Elliott v. Lyman*, 3 Allen 110.

No point is open on exceptions, which does not appear by the bill of exceptions to have been fairly embraced in the objections taken at the trial. *Alexander v. Carew*, 13 Allen 70, 71.

It may, however, be the duty of the supreme court, when a case is before it on exceptions, "to set aside a verdict for an omission to give an instruction, although no request for specific

direction was made at the time. This should be the rule whenever it clearly appears by a bill of exceptions that a party has failed to offer evidence sufficient in law to prove his case." *Brightman v. Eddy*, 97 Mass. 478, 481.

If the exceptions which are sustained relate to a question of damages only, a new trial should be had on that question only. *Kent v. Whitney*, 9 Allen 62.

*"Such exceptions being reduced to writing in a summary mode,"* §c. Neither party is to be required to allege his exceptions in writing before the jury retire. St. 1863, c. 180, s. 2.

*"May be presented to the court before the adjournment without day of the term."* After such adjournment it is too late. *Phillips v. Soule*, 6 Allen 150. See also *Barstow v. Marsh*, 4 Gray 165, 166.

SECT. 10. *"To be frivolous, immaterial, or intended for delay."* See note to section 13 of chapter 112.

(Bill of exceptions or appeal in criminal cases in superior court not to stay proceedings except, &c. St. 1864, c. 250, s. 5. Repealed by St. 1866, c. 228.)

SECT. 11. *"Or fails to sign and return the exceptions."* In a case in which a judge of the superior court had retained a bill of exceptions for more than a year, and until after his resignation, and the party excepting had omitted to prove the exceptions under this section, it was held that the superior court had properly granted a new trial of the action. *Borrowscale v. Bosworth*, 98 Mass. 84.

*"The supreme judicial court shall make and promulgate rules,"* §c. See law rules of supreme court, rule XXXII.

SECT. 12. This section superseded by St. 1864, c. 111.

SECT. 13. See chapter 112, s. 11.

SECT. 20. See *Commonwealth v. Bannon*, 97 Mass. 214.

## CHAPTER CXVI.

## OF POLICE COURTS.

SECT. 1. "*Boston.*" Police court of the city of Boston abolished, and "municipal court" of that city established in its place. St. 1866, c. 279.

"*Haverhill.*" Judicial district of Haverhill enlarged, to include Bradford. St. 1851, c. 207, s. 1. Police court of Haverhill abolished by St. 1866, c. 296. Re-established, — district to include towns of Haverhill, Bradford, and Groveland. St. 1867, c. 316.

"*Milford.*" Police court of Milford abolished, by St. 1861, c. 158. Re-established by St. 1864, c. 70.

"*Pittsfield.*" Police court of Pittsfield abolished, and the "district court for central Berkshire" established in its place. St. 1869, c. 416.

"*Roxbury.*" Name of this court changed to the "municipal court of the southern district of Boston." St. 1867, c. 359, s. 4.

"*Taunton.*" Police court of Taunton abolished, and "municipal court" established. St. 1864, c. 209. — St. 1864, c. 217.

"*Worcester.*" Police court of Worcester abolished, and "municipal court" established. St. 1868, c. 198.

Police court of *Charlestown* established. St. 1862, c. 107.

Police court of *Fitchburg* established. St. 1868, c. 124.

*Justices and Clerks.*

SECT. 3. "*Shall continue to hold their offices according to the tenor of their commissions.*" Justices of police courts must, according to the constitution, chap. 3, arts. 1, 3, be appointed and commissioned to hold during good behavior. Opinion of Justices, 3 Cush. 584.

SECT. 4. This section repealed and superseded by St. 1868, c. 169.



*Jurisdiction — Criminal.*

SECT. 13. Police courts have jurisdiction of offences punishable as specified in this section, although the statute fixing the penalty provides that a bond for good behavior may be required in addition to the fine and imprisonment. *Commonwealth v. Carr*, 11 Gray 463, 464.

SECT. 14. Police courts shall have also jurisdiction, concurrent with superior court, of all offences under Gen. St. c. 87, ss. 6, 7, and of all complaints under the common law for the keeping and maintenance of a common, ill-governed, and disorderly house. St. 1863, c. 78. Also, in their discretion, over offences described in Gen. St. c. 50, s. 27 (peddling contrary to law). St. 1868, c. 12.

With regard to larcenies from the person of property not alleged to exceed the value of fifty dollars, see *Lewis v. Robins*, 13 Allen 552.

SECT. 16. "As no warrant can be issued except in cases and with the formalities prescribed by law, it is an inevitable implication from the authority to issue a warrant, that the magistrate may do whatever act the law requires as an essential preliminary to it. Therefore, whenever a complaint, duly sworn to, is made by law to be such an essential preliminary, he may administer the oath, and certify to the fact that it has been taken before him." *Richardson v. Burleigh*, 3 Allen 479, 480.

SECT. 17. "*By a justice of the peace in any district.*" A justice of the peace may receive complaints and issue warrants returnable before a police court, although that court has been granted "exclusive jurisdiction over the offence." *Commonwealth v. O'Connell*, 8 Gray 464.

"*Under the provisions of chapter twenty-two.*" A complaint under that chapter for the maintenance of a bastard may be made returnable before the police court of the town in which the child was born and the complainant lives, although the

child was begotten in another town, in the same county, in which a police court is established. *Garlick v. Bartlett*, 4 Allen 365.

*Civil.*

SECTS. 18, 19. As to the exclusive jurisdiction of the municipal (formerly police) court of Worcester, see St. 1862, c. 148. — St. 1868, c. 198, s. 9.

Jurisdiction of police courts of Boston and Chelsea, in civil actions and proceedings, so far as it extends, to exclude that of justices of the peace in the county of Suffolk. St. 1863, c. 197.

*Sessions, Proceedings, &c.*

Constables may be designated to attend police courts and trial justices in certain cases. St. 1862, c. 216, ss. 13, 14.

SECT. 20. Nothing in this section shall authorize any police court to be held in any other place than such as shall be provided therefor by the district for which such court may have been established. St. 1861, c. 115.

“Police courts and municipal courts shall be held for the transaction of criminal business, daily, except on Sundays and legal holidays.” St. 1869, c. 385.

SECT. 21. “*And two-thirds of such expenses shall be repaid,*” &c. This clause struck out by St. 1861, c. 172.

SECT. 22. “*In case of his sickness, interest, absence, or other disability.*” See *Williams v. Robinson*, 6 Cush. 333.

“*The fact being stated on the record.*” This clause refers, not only to what immediately precedes, but to the whole of the preceding part of the section. *Dike v. Story*, 7 Allen 349, 351.

The compensation of a special justice may at his request be deducted out of the salary of the standing justice by the treasurer of the commonwealth, and by him paid to the special justice. St. 1862, c. 170.

SECT. 26. “*Signed by the clerk or an assistant clerk.*” It is not contrary to the constitution, chapter 6, article 5, and the nineteenth article of amendment to the constitution, that writs

should be signed either by the clerk or assistant clerk. *Jacobs v. Measures*, 13 Gray 74.

*"Shall bear test of the justice."* The standing justice of a police court may be described in the process as "justice" simply, without specifying whether standing or special. *Commonwealth v. Jeffs*, 14 Gray 19.

*"And in case of the death," &c.* It seems that the reason why the special justice acts, must appear, either by being appended to his signature, or otherwise. *Commonwealth v. Fitzgerald*, 14 Gray 14. — *Commonwealth v. McCarty*, 14 Gray 18.

SECT. 27. Witnesses in criminal cases may be ordered to recognize to appear at the next or any succeeding term of court. St. 1868, c. 69.

SECT. 31. Costs in criminal proceedings and receipts therefor to be entered in a record book. St. 1860, c. 191, s. 7.

#### *Salaries.*

SECT. 33. *"Boston."* Salary of chief justice and of each of the associate justices of the "municipal court of the city of Boston" to be \$3,000. St. 1866, c. 279, s. 4. Salary of clerk raised to \$2,000,—of second assistant clerk fixed at \$1,500. St. 1860, c. 100.—St. 1866, c. 279, s. 4.

*"Southern District of Boston."* Salary of justice of the "municipal court of the southern district of Boston" (formerly "police court of Roxbury") raised to \$1,800. Salary of clerk raised to \$1,000. St. 1869, c. 359, s. 1. See also St. 1867, c. 359, s. 4.

*"Cambridge."* Salary of justice raised to \$1,800. Of clerk, to \$1,000. St. 1869, c. 359, s. 2. (See also St. 1866, c. 298, s. 9.)

*"Charlestown."* See St. 1862, c. 209, s. 3.—St. 1869, c. 359, s. 2.

*"Chelsea."* Salary of justice raised to \$1,600. St. 1869, c. 359, s. 2. (See also St. 1864, c. 256.)

*"Chicopee."* Salary of justice raised to \$1,600. St. 1869, c. 359, s. 2.

*"Fall River."* Salary of justice raised to \$1,200, and of clerk to \$800. St. 1862, c. 92. — St. 1869, c. 359, s. 2.

*"Gloucester."* Salary of justice raised to \$1,600. St. 1869, c. 359, s. 2. (See also St. 1864, c. 127.)

*"Haverhill."* Salary of justice fixed at \$1,200. Of clerk, at \$600. St. 1867, c. 316. (See also St. 1861, c. 207.)

*"Lawrence."* Salary of justice raised to \$1,800. Of clerk, to \$1,000. St. 1869, c. 359, s. 2.

*"Lee."* Salary of justice raised to \$500. St. 1861, c. 141.

*"Lynn."* Salary of justice raised to \$1,200. Of clerk, to \$800. St. 1869, c. 359, s. 2.

*"Milford."* Salary of justice raised to \$1,600. St. 1869, c. 359, s. 2. (See also St. 1866, c. 298, s. 9. — St. 1864, c. 70, s. 3.)

*"Newburyport."* Salary of justice raised to \$1,000. Of clerk, to \$600. St. 1869, c. 359, s. 2.

*"Pittsfield."* See St. 1869, c. 416.

*"Salem."* Salary of justice raised to \$1,800. Of clerk, to \$1,000. St. 1869, c. 359, s. 2.

*"Springfield."* Salary of justice raised to \$2,000. St. 1868, c. 330.

*"Taunton."* Salary of justice of municipal court of Taunton raised to \$1,200. Of clerk, to \$800. St. 1869, c. 359, s. 1. See also St. 1864, c. 209, s. 21.

*"Worcester."* Salary of justice of municipal court of the city of Worcester fixed at \$2,000. Of clerk, at \$1,200. St. 1868, c. 198. (See also St. 1864, c. 281.)

*Police Court of Boston.*

Municipal court of the city of Boston substituted for the police court of Boston. St. 1866, c. 279. — St. 1867, c. 355. — St. 1867, c. 356.

## CHAPTER CXVII.

## OF PROBATE COURTS.

*Courts and Jurisdiction.*

Probate courts made courts of record. St. 1862, c. 68, s. 3.

As to the jurisdiction of probate courts in cases in which the judge of the court is interested, see chapter 119, s. 4, and notes to the same.

SECT. 2. "*Of persons who at the time of their decease were inhabitants of or residents in the county.*" As to what constitutes a person such an inhabitant or resident, see *Holyoke v. Haskins*, 5 Pick. 20. — *Harvard College v. Gore*, 5 Pick. 370.

"*Leaving estate to be administered in such county.*" Although no such estate is included in the inventory filed, parol evidence, to show that such estate was left by the deceased, is admissible for the purpose of proving the validity of the administration. *Harrington v. Brown*, 5 Pick. 519.

Real estate conveyed away by the deceased in fraud, of his creditors is within the meaning of this clause. *Bowdoin v. Holland*, 10 Cush. 17.

The probate court has jurisdiction of a question of fraud, so far as it is incidental to any subject of which it has jurisdiction under the statutes. *Wade v. Lobdell*, 4 Cush. 510, 512.

SECT. 4. Prior to Rev. St. c. 83, s. 12, if jurisdiction was assumed by the probate court in the wrong county, the grant of administration and all proceedings under it were absolutely void. *Holyoke v. Haskins*, 5 Pick. 20. — *Cutts v. Haskins*, 9 Mass. 543.

SECT. 5. "*Notice to all persons.*" By St. 1864, c. 265, certain notices were required to be sent by mail, but by St. 1865, c. 254, that act was repealed, and it was provided that "no right, title, or proceeding shall be affected by reason of any failure or omission heretofore to comply with the requirements thereof."

*Appeals.*

The supreme court has no authority to issue a writ of certiorari to the probate court, or to annul or reverse a decree of that court otherwise than by appeal. *Peters v. Peters*, 8 Cush. 529, 535, 548.

SECT. 8. "*Any person aggrieved.*" The heirs presumptive of a non compos are entitled, as "persons aggrieved," to appeal from a decree of the probate court allowing an account of the guardian of such non compos. *Boynton v. Dyer*, 18 Pick. 1, 3.

Sureties on the bond of a deceased and insolvent guardian have a right to appeal from a decree settling an account of such guardian, and fixing an amount as due from his estate to that of the ward. *Farrar v. Parker*, 3 Allen 556.

An administrator de bonis non may appeal from a decree allowing the administration accounts of the original executor or administrator. *Wiggin v. Swett*, 6 Met. 194, 196.

An administrator appointed in another state, on the estate of a person there deceased, may appeal from a decree in this state appointing an administrator here. *Smith v. Sherman*, 4 Cush. 408, 411.

Where by a will a large pecuniary bequest, payable at a future day, was made to a town in trust to establish certain agricultural institutions, such town was held to be entitled to appeal from a decree respecting such will. *Northampton v. Smith*, 11 Met. 390, 398.

But a creditor of an heir-at-law is not entitled to appeal from a decree allowing a will of the ancestor of such heir. Otherwise, if the creditor, at the time of the decree and appeal claimed, has an attachment on the real estate of such heir. *Smith v. Broadstreet*, 16 Pick. 264.

One claiming property under a gift causa mortis, is not entitled to appeal from a decree charging the administrator of the deceased donor with the property and ordering it to be distributed among the next of kin. *Lewis v. Bolitho*, 6 Gray 137.

Upon an appeal from a decree allowing a will, where the question is as to the due execution of such will, devisees named therein have a right to appear as parties to establish it, although an administrator with the will annexed has been appointed, and appears for the same purpose. *Eliot v. Eliot*, 10 Allen 357.

It seems that one, to whom money has been paid under a decree of the probate court, cannot after such payment appeal from such decree. *Hale v. Hale*, 1 Gray 518, 522.

SECT. 10. "*His reasons of appeal.*" The appellant is restricted to the points specified in his reasons of appeal, but not to the same arguments, views, or evidence which were presented before the court of probate. *Boynton v. Dyer*, 18 Pick. 1, 4.

SECT. 11. If one has received money paid him pursuant to a decree of the probate court, that fact will be a sufficient reason for refusing to grant his petition under this section. *Hale v. Hale*, 1 Gray 518, 522.

"*Without default on his part.*" See *Wright v. Wright*, 13 Allen 207, 210.

An heir who has notice of an appeal by another heir, but takes no steps towards prosecuting such appeal, which is afterwards compromised without his knowledge and a decree entered accordingly, is not sufficiently "without default" to be able to maintain a petition for leave to enter a new appeal in his own name. *Kent v. Dunham*, 14 Gray 279, 281.

When leave to enter an appeal is granted under this section, the entry of the appeal should be made at the term at which the leave is granted. *Robinson v. Durfee*, 7 Allen 242.

SECT. 15. Proceedings of probate courts not to be affected by any appeal, provided decree or order confirmed, and provided proceedings stayed during pendency of appeal. St. 1860, c. 189.

When a decree appointing an administrator is appealed from, the authority of such administrator is thereby suspended. *Arnold v. Sabin*, 4 Cush. 46, 47.

*Miscellaneous Provisions.*

As to the power of the probate court to revoke or correct its own decrees, see *Waters v. Stickney*, 12 Allen 1, and cases there cited, — also *Pettee v. Wilmarth*, 5 Allen 144.

Registers may at any time receive and file petitions and applications, and may issue orders of notice and citations, but when the judge deems such notice insufficient, he may order further notice. St. 1863, c. 156. (St. 1860, c. 163.)

By St. 1864, c. 265, certain probate notices were required to be sent by mail, but by St. 1865, c. 254, that act was repealed, and it was provided that “no right, title, or proceeding shall be affected by reason of any failure or omission heretofore to comply with the requirements thereof.”

SECT. 19. Pursuant to this section certain forms for proceedings in the probate courts were framed by “Judges John Wells and William A. Richardson, a committee of the judges of the probate courts,” which forms were approved by the supreme court, which, on Jan. 15, 1862, passed an order that, “to secure regularity and uniformity in the proceedings of the probate courts in the several counties,” — “copies of all said forms be filed in this court and recognized as standard forms to be adopted and used in all the probate courts of this commonwealth.”

SECT. 21. Certain discharges of claims against, and acknowledgments of performance of duty or payment of money by executors, administrators, guardians, or trustees to be recorded, indexed, &c. St. 1864, c. 93.

As to the early practice in this state with regard to the recording of decrees, orders, &c., see *Marcy v. Marcy*, 6 Met. 360, 368.

SECT. 22. As to the law upon the subject of this section prior to statute, see *Hathaway v. Clark*, 5 Pick. 490.

SECT. 25. As to the general practice of the supreme court as to allowance of costs in cases of contested wills, see *Woodbury v. Obear*, 7 Gray 467, 472. — *Edwards v. Ela*, 5 Allen 87, 89.



*Sessions of the Courts.*

SECT. 36. "Probate courts, in addition to the terms now allowed by law, may transact any business within their jurisdiction, when due notice has been given to all parties interested; or, when no notice is required, on any day when courts may lawfully be held." St. 1869, c. 424.

For the times of holding courts for *Middlesex*, see St. 1868, c. 213. (Prior changes, St. 1866, c. 116. — St. 1867, c. 220.)

For the times of holding courts for *Worcester*, see St. 1869, c. 253.

*Hampshire*. Court to be held at Williamsburg, instead of Chesterfield, on third Tuesdays of May and October. St. 1866, c. 60.

*Hampden*. For times of holding courts in this county, see St. 1865, c. 123.

*Franklin*. No courts to be held at Locks' Village, in Shutesbury, or at Charlemont, but additional courts to be held at Orange on third Tuesday in June, and at Shelburne Falls on fourth Tuesday in May. St. 1867, c. 249.

*Berkshire*. For times of holding courts in this county, see St. 1869, c. 60. (Prior changes, St. 1868, c. 325, s. 2. — St. 1868, c. 329.)

*Norfolk*. For times of holding courts in this county, see St. 1868, c. 214.

*Bristol*. For times of holding courts in this county, see St. 1862, c. 5.

*Plymouth*. For times of holding courts in this county, see St. 1863, c. 245, as amended by St. 1868, c. 169.

*Barnstable*. For the times of holding courts in this county, see St. 1869, c. 277. (Prior alterations by St. 1867, c. 307. — St. 1868, c. 196.)

*Dukes County*. For the times of holding courts in this county, see St. 1862, c. 114.

*Nantucket*. For the times of holding courts in this county, see St. 1863, c. 146.

## CHAPTER CXVIII.

## OF COURTS OF INSOLVENCY.

No notes upon this chapter are given, as the insolvent laws of Massachusetts have been superseded by the United States bankruptcy law (U. S. St. 1867, c. 176). That statute superseded the state law on June 1st, 1867, so that no proceedings by or against a debtor could be instituted under the latter on or after that date. *Day v. Bardwell*, 97 Mass. 246, 250.

## CHAPTER CXIX.

## OF JUDGES AND REGISTERS OF PROBATE AND INSOLVENCY.

*Judges.*

A judge of probate and insolvency has no authority to act as such out of his county, except in the cases provided for in the statutes, or when the act to be done is substantially ministerial in its nature. *Lee v. Wells*, 15 Gray 459.

SECT. 4. "No judge of probate and insolvency shall be disqualified from acting in any case by reason of interest, unless such interest is direct, and to the amount of one hundred dollars of principal claimed by or against him, nor until the same appears of record in the case." St. 1860, c. 145.

It was formerly held that, under St. 1817, c. 190, s. 5, and Rev. St. c. 83, s. 15, if a judge of probate was interested in an estate, as by having a valid claim against it, all proceedings before him regarding such estate were void for want of jurisdiction, even though he had determined in his own mind not to enforce his claim, and though no objection to his assuming jurisdiction was made at the time. *Cottle, Appellant*, 5 Pick. 483. — *Coffin v. Cottle*, 9 Pick. 287. — *Sigourney v. Sibley*, 21 Pick. 101. — *Gay v. Minot*, 3 Cush. 352, 354. — *Sigourney v. Sibley*, 22 Pick. 507.

By St. 1851, c. 253, however, it was provided that a judge of probate should not be disqualified by interest, *unless it exceeded one hundred dollars*; and by St. 1856, c. 268, it was further provided that such judge should not be rendered "incompetent, by reason of interest, to act in the settlement of the estates of persons *deceased*, unless the principal sum due or claimed, *without interest*, should exceed one hundred dollars."

The fact that a judge has been appointed executor of the will of a person to whom a devise has been made in the will of another, has been held to make him "interested" in such latter will. Bacon, Appellant, 7 Gray 391. But quære, whether such interest would be considered to be "direct," under St. 1860, c. 145.

A judge, who acts as attorney for one interested in an estate, does not thereby become himself interested in such estate. Cottle, Appellant, 5 Pick. 483.

Nor is a judge, who is an inhabitant of a town for the benefit of the poor in which a bequest to trustees has been made in a will, to be deemed to be interested in such will. Northampton v. Smith, 11 Met. 390. This case contains a general consideration of the nature of the interest which disqualifies a judge of probate from acting. By Gen. St. c. 122, s. 13, it is provided that no person shall be disqualified from acting as judge "in a suit or proceeding in which any city or town is interested, by reason of his interest as an inhabitant thereof."

"*Or if there is a vacancy in any county.*" Prior to the General Statutes the existence of a vacancy did not authorize the transfer of a case to another county. Grafton Bank v. Bickford, 13 Gray 564.

SECT. 6. It seems that, even if a judge allows himself to be retained or employed as counsel contrary to this section, it will not oust him of his jurisdiction, nor render his acts invalid. Cottle, Appellant, 5 Pick. 483, 484.

*Registers.*

Judges to inspect doings and records of registers. If records left incomplete for more than six months, unless, &c., to be adjudged forfeiture of register's bond, and bond to be put in suit. St. 1861, c. 95.

*Salaries and Fees.*

SECT. 16. For present salaries of judges, registers, and assistant registers, see St. 1867, c. 357, s. 1. (Previously altered by St. 1864, c. 298.)

## CHAPTER CXX.

## OF JUSTICES OF THE PEACE.

SECT. 1. This section alters the jurisdiction of justices from what it was previous to the General Statutes. Then actions for trespass on real estate or for disturbance of a right of way or other easement, and all other personal actions in which the title to real estate was concerned, might be commenced in the court of common pleas or superior court, although the damages demanded did not exceed \$20. By this section all such actions, where the damages demanded fall below the above limit, must be *commenced* before a justice of the peace or police or municipal court. See Report of Commissioners on Gen. St., notes to chapter 113, section 5, and to this section. See also *Heims v. Ring*, 11 Allen 352, 353.

With regard to the jurisdiction of justices of the peace, as affected by the residence or places of business of the parties, see *Aspinwall v. Cushman*, 11 Allen 405.

"*Wherein the debt or damages demanded do not exceed \$20.*" The jurisdiction is determined solely by the *ad damnum* set forth in the writ, although the actual amount in controversy may be less. *Ashuelot Bank v. Pearson*, 14 Gray 521.

SECT. 6. "*No writ issued by a justice of the peace shall run*

*into any other county," &c.* It seems that, in certain cases of writs of forcible entry and detainer, the writ may run into another county. St. 1866, c. 47.

If a justice's writ is served in another county contrary to this section, the service will be a mere nullity, and will give the justice no right or authority to take cognizance of the case. *Pitman v. Tremont Nail Co.*, 2 Allen 531, 532.

SECT. 7. It seems that a writ cannot lawfully run into another county under this section for the purpose of attachment, unless the justice has a right to take jurisdiction of the *person* of the defendant. *Cahoon v. Harlow*, 7 Allen 151, 152.

SECT. 12. As to the proper mode of proceeding by the defendant in the case provided for in this section, see *Raymond v. Bolles*, 11 Cush. 315, 318.

SECT. 14. "*The party requiring the case to be removed shall recognize,*" &c. See note to section 26.

SECT. 16. Under this section a defendant may avail himself of a *tender* upon a general denial made orally, but he must perfect his tender by paying, or offering to pay, the money into the court before trial or other disposition of the case in that court, if he would avail himself of such tender in the superior court upon appeal. *Brickett v. Wallace*, 98 Mass. 528.

"*An entry shall be made upon the record that the defendant appears,*" &c. An entry that "the defendant appears and pleads orally and says he is not guilty," will be sufficient under this section. *Wilbur v. Taber*, 9 Gray 361.

SECT. 17. "*When the debt or damage exceeds \$20.*" This is to be determined solely by the *ad damnum* in the writ. *Trees v. Rushworth*, 9 Gray 47. — *Ashuelot Bank v. Pearson*, 14 Gray 521.

SECT. 25. "*Aggrieved by the judgment of a justice.*" This refers to a judgment of nonsuit as well as to a judgment on the merits. *Ball v. Burke*, 11 Cush. 80.

"*Within twenty-four hours.*" Such hours must be exclusive of Sunday. *McIniffe v. Wheelock*, 1 Gray 600, 603.

*"After the entry of the judgment."* This refers to the time when the judgment is actually rendered, though the formal entry thereof on the docket may be delayed. *Gardner v. Dudley*, 12 Gray 430.

*"To the superior court then next to be held."* That is, next after the entry of the judgment, though before the taking of the appeal. *McIniffe v. Wheelock*, 1 Gray 600.

*"In like manner as if it had been originally commenced there."* See *Jaha v. Belleg*, 13 Allen 78, 80. — *Lew v. Lowell*, 6 Allen 25, 27.

SECT. 26. Recognizance not to be required when defendant, has given a bond to dissolve an attachment made in the suit. St. 1862, c. 217, s. 5.

In any case the defendant, instead of giving recognizance under this section, may give bond, &c. St. 1862, c. 217, s. 6.

*"The appellant shall \* \* \* recognize," &c.* The appellant may do this by his attorney. *Adams v. Robinson*, 1 Pick. 461.

*"If required by him."* If not so required, no recognizance at all need be given. *McKeag v. O'Donnell*, 10 Allen 543.

*"With condition to prosecute," &c.* The insertion of an obligation which is unwarranted will render the recognizance void. *Newcomb v. Worster*, 7 Allen 198.

SECT. 28. See *Lew v. Lowell*, 6 Allen 25. — *Wilbur v. Taber*, 9 Gray 361.

SECTS. 29-31. Provisions for continuing suits when the justice dies after service of the writ and before final judgment. St. 1862, c. 141.

*Jurisdiction, &c., in Criminal Matters.*

As to the general foundation of such jurisdiction, see *Knowles v. Davis*, 2 Allen 61, 64.

SECT. 32. If one, who has been arrested without a warrant by a justice of the peace for an assault committed in his presence, escapes, a constable may be ordered by the justice, without a warrant, to pursue and retake him. *Commonwealth v. McGahey*, 11 Gray 194.

*Trial Justices.*

The governor, with the advice and consent of his council, may at any time revoke the designation of any trial justice. St. 1860, c. 187, s. 1.

Trial justices to hold office for *three years* only. St. 1860. c. 187, s. 2.

Acts of certain trial justices, not duly qualified, confirmed. St. 1864, c. 286.

Trial justices may, in their discretion, take jurisdiction of offences of peddling contrary to law. St. 1868, c. 12.

SECT. 34. A trial justice to be designated from each of the towns of Bridgewater, Palmer, and Tewksbury to take cognizance of complaints under St. 1866, c. 198, s. 5. St. 1866, c. 198, s. 7.

Number of trial justices in Hampshire County not to exceed *ten*, instead of *eight*. St. 1869, c. 254.

SECT. 37. The jurisdiction given by this section is not exclusive, but concurrent with the superior court. *Commonwealth v. Rowe*, 14 Gray 46, 48. — *Commonwealth v. Hudson*, 11 Gray 64.

Although a defendant on conviction may be liable, in addition to both the penalties named in this section, to pay the costs of prosecution, and to enter into a recognizance for good behavior, such fact will not prevent a trial justice from taking jurisdiction. *Commonwealth v. Burns*, 14 Gray 35, 36.

SECT. 46. This section authorizes an appeal even from a *void* sentence. *Commonwealth v. O'Neil*, 6 Gray 343, 345.

*General Provisions.*

Justices of the peace may take acknowledgments of deeds and other instruments in any county, and their summonses for witnesses in civil cases may be served in any county. St. 1863, c. 157, ss. 1, 3.

Justices to be notified of the expiration of their commissions, and to be liable to fine, if, having received such notice, they act after such expiration. St. 1865, c. 231.

SECT. 54. It is no ground for dismissing a bastardy process in the superior court, that the justice before whom the original complaint was made, appears in that court as the attorney for the complainant. *Kenney v. Driscoll*, 1 Allen 210. — *Reardon v. Russell*, 9 Gray 366. See section 39 of chapter 121.

## CHAPTER CXXI.

### OF CLERKS, ATTORNEYS, AND OTHER OFFICERS OF JUDICIAL COURTS.

SECTS. 3-4. Duty of clerks, when rescript filed, to give notice to the attorney of record of each party, and to transmit a copy of rescript to reporter. St. 1869, c. 74.

SECT. 6. "The assistant clerks of courts in the several counties shall be assistant clerks of the county commissioners." St. 1860, c. 11.

SECT. 8. Assistant clerks for Essex and Norfolk to be appointed,—their salaries, duties, &c. St. 1867, c. 295, s. 4.

SECT. 9. In case of sickness, &c., of *assistant* clerks, assistant clerks *pro tempore* may be appointed. St. 1863, c. 64.

SECT. 24. Salaries of clerks in counties of Berkshire, Bristol, Dukes, Hampden, Middlesex, Nantucket, Norfolk, and Worcester, and of the clerk of the superior court for civil business in Suffolk, and of the clerk of that court for criminal business in that county, altered by St. 1867, c. 295, ss. 1, 2, 3. (Salary of clerk in Berkshire County, previously altered by St. 1866, c. 298, s. 10.)

Clerk of the superior court for civil business in Suffolk to be allowed to retain \$500 for clerk hire. St. 1866, c. 298, s. 9.

No extra fees or charges to be allowed or paid to clerks of courts. St. 1860, c. 191, s. 9.

SECT. 26. Salaries of assistant clerks in counties of Middle-



sex and Worcester, and salary of assistant clerks of the supreme judicial court, and of the superior court for civil business in Suffolk, altered by St. 1867, c. 295, s. 5. (Salary of assistant clerk in Middlesex County previously altered by St. 1865, c. 209.)

No extra fees to be paid to assistant clerks. Payment of assistant clerks performing the duties of clerks, &c., &c. St. 1860, c. 191, s. 9.

SECT. 27. As to the payment of clerks pro tempore, and of assistant clerks, except those specially provided for, see St. 1860, c. 191, s. 9.

*Attorneys at Law.*

SECT. 34. No attorney, removed under this section, "shall be allowed to manage, prosecute, or defend any suit under special authority from the party for whom he appears, or by personal nomination in open court." St. 1865, c. 81.

For a case arising upon proceedings under this section, see Randall, Petitioner, 11 Allen 472, 473.

SECT. 37. For the law upon the subject of an attorney's lien, prior to the Revised Statutes, see Baker v. Cook, 11 Mass. 236. — Dunklee v. Locke, 13 Mass. 535. — Getchell v. Clark, 5 Mass. 309. — Woods v. Verry, 4 Gray 357, 359.

An attorney may enforce the lien given him by this section, by an action upon the judgment in the name of his client. Woods v. Verry, 4 Gray 357.

SECT. 39. See section 54 of chapter 120, and notes to the same.

SECT. 40. See similar provisions in ch. 17, ss. 64, 80, and ch. 18, s. 65.

Under the statute upon this subject which was in force prior to the Revised Statutes (St. 1783, c. 44, s. 3), it was held that if a writ were made or altered by a sheriff, it would be void, and an attachment made thereon would not be good as against a subsequent attachment or a subsequent conveyance by the debtor to a bonâ fide purchaser. Smith v. Saxton, 6 Pick.

483. — *Clarke v. Lyman*, 10 Pick. 45. It is to be noted, however, that the early statute above referred to contained an express provision, omitted in the Revised and General Statutes, that all acts of sheriffs contrary to its provisions *should be void*.

*Masters in Chancery.*

SECT. 41. Number of masters in chancery for each of the counties of Suffolk, Middlesex, and Essex, to be seven. St. 1868, c. 185.

*Auditors.*

Police courts not to send cases to auditors unless both parties consent in writing. St. 1863, c. 197, s. 1.

The report of an auditor appointed by a police court may be used in evidence in the superior court on appeal. *Webber v. Orne*, 15 Gray 351.

The court may require an auditor's report to be read, although neither party desires it. *Clark v. Fletcher*, 1 Allen 53.

A minority report made by one of three auditors is not admissible in evidence. *Lincoln v. Taunton Copper Manuf. Co.*, 9 Allen 181.

If a case is submitted upon the report of an auditor, who states all the facts and his conclusions from those facts, the court will not be bound by his conclusions, although he states them as facts found by him. *Ropes v. Lane*, 9 Allen 502, 514. — *Morrill v. Keys*, 14 Allen 222. See, however, *Leathe v. Bullard*, 8 Gray 545.

For a general consideration of the powers and duties of auditors, see *Locke v. Bennett*, 7 Cush. 445, 446. — *Quimby v. Cook*, 10 Allen 32, 33.

The question whether an auditor's report shall be recommended is addressed to the discretion of the presiding judge, and his ruling in the matter is not subject to exception. *Kendall v. Weaver*, 1 Allen 277, 278.

SECT. 46. "*The report shall be primâ facie evidence.*" The report of an auditor is *primâ facie* evidence of the facts found

by him, even though he reports the evidence in detail on which his finding is based. *Leathe v. Bullard*, 8 Gray 545. But see *Ropes v. Lane*, 9 Allen 502, 514.

Though it is *prima facie* evidence, an auditor's report does not change the burden of proof. *Morgan v. Morse*, 13 Gray 150.

SECT. 47. "*The auditors shall give notice to the parties,*" &c. When an auditor's report is recommitted for amendment in matter of form, he need not give notice to or hear the parties. *Webber v. Orne*, 15 Gray 351.

SECT. 50. The compensation awarded to auditors may be paid by either party to the suit, and taxed in his bill of costs if he prevails. St. 1867, c. 67.

*Reporter.*

Reports after "Allen's" to be styled "Massachusetts Reports," and the number of the volume to be determined by reckoning all the previous volumes. St. 1867, c. 239.

Acts respecting the purchase and distribution of the reports. St. 1859, c. 265. — St. 1864, c. 282.

## CHAPTER CXXII.

### SPECIAL PROVISIONS RESPECTING COURTS AND THE ADMINISTRATION OF JUSTICE.

"No person holding a judicial office under the laws of the United States shall hold any judicial office under the constitution and laws of this state, except those of trial justice and justice of the peace." St. 1868, c. 24, s. 1.

"No person holding the office of register of bankruptcy under the laws of the United States shall at the same time hold any judicial office, except that of justice of the peace, nor the office of clerk or assistant clerk of any court, nor register or assistant register of probate, or of probate and insolvency, under the laws of this commonwealth." St. 1867, c. 357, s. 2.

Courts and justices of this state to have jurisdiction of actions under tax laws of the United States. St. 1863, c. 124.

SECT. 4. A magistrate cannot legally discharge a poor debtor on a Fast-day. *Estes v. Mitchell*, 14 Allen 156.

SECT. 5. *Special* coroners only "shall have power to serve lawful processes." St. 1861, c. 113, s. 2.

SECT. 13. Prior to the General Statutes, as a general rule, a magistrate had no jurisdiction of a suit in which the city or town in which he lived was interested. *Clark v. Lamb*, 2 Allen 396. — *Commonwealth v. Emery*, 11 Cush. 406, 411. — *Gifford v. White*, 10 Cush. 494. — *Pearce v. Atwood*, 13 Mass. 324. This rule, however, was subject to exceptions. See Rev. Sts. c. 90, s. 124, p. 808. — *Commonwealth v. Wilson*, 11 Cush. 406, 411.

"*And no juror shall be disqualified by reason of being an inhabitant of the city of Boston.*" The interest of a city or town in a suit will, as a general rule, disqualify its inhabitants from acting as jurors. *Hawes v. Gustin*, 2 Allen 402, 404.

---

## TITLE II.

### OF ACTIONS AND PROCEEDINGS THEREIN.

WHENEVER in a civil suit or proceeding a bond is required to be given by any party, the bond of another person may be taken, provided, &c. St. 1869, c. 436. — (St. 1868, c. 285.)

## CHAPTER CXXIII.

### OF THE COMMENCEMENT OF ACTIONS AND SERVICE OF PROCESS.

#### *Venue of Actions.*

SECT. 1. Transitory actions by or against executors or administrators may be brought in the county where they might

have been brought by or against the testate or intestate at the time of his decease. St. 1865, c. 13.

*"Transitory actions."* Bastardy complaints, under Gen. St., c. 72, are embraced under this head. *Williams v. Campbell*, 3 Met 209. — *Garlick v. Bartlett*, 4 Allen 365, 366. — *Gallary v. Holland*, 15 Gray 50. But not writs of error. *Ide v. Cleworth*, 10 Cush. 415.

An action of contract to enforce the specific performance of an agreement to convey land is a transitory action, and need not be brought in the county where the land lies. *Davis v. Parker*, 14 Allen 94, 98.

An action on a covenant concerning land, brought by an assignee of the covenantee against the covenantor, is local and not transitory. *Clark v. Scudder*, 6 Gray 122.

*"The writ shall abate."* The defendant can take advantage of a wrong venue only by plea or answer in abatement. *Cleveland v. Welsh*, 4 Mass. 591. — *Brown v. Webber*, 6 Cush. 560, 563. — *Murphy v. Merrill*, 12 Cush. 284. — *Hastings v. Bolton*, 1 Allen 529. — *Sperry v. Ricker*, 4 Allen 17.

SECT. 5. As to the object of this section, see *Raymond v. City of Lowell*, 6 Cush. 524, 529.

Actions by the commonwealth, or to recover money due to the commonwealth, may be brought in the county where the defendant lives or has his usual place of business, or in the county of Suffolk. St. 1866, c. 233, s. 1.

*Third clause.* *"An established or usual place of business."* In the case of a turnpike corporation which exercised its franchise in several counties, having in one of them a toll-house, where it kept an agent to collect tolls and sell tickets, and where its treasurer sometimes paid the workmen employed by it, it was held that the corporation had "an established or usual place of business" in such county, although it had an office in another county, where its books were kept and its meetings held, and which was used by its treasurer and superintendent. *Rhodes v. Salem Turnpike and Chelsea Bridge Corp.*, 98 Mass. 95.

*Forms, Issuing, and Return of Writs.*

SECT. 10. The first form mentioned in this section is the usual printed form issued by the clerks of the various courts, and is as follows:—

## COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

*To the Sheriffs of our several Counties and their Deputies, greeting:*

[SEAL OF COURT.]

We command you to attach the goods or estate of C. D., of Boston, in said county, merchant, to the value of one thousand dollars, and for want thereof to take the body of the said C. D. (if he may be found in your precinct) and him safely keep, so that you have him before our Justices of our Superior Court, next to be holden at Boston, within and for our said county of Suffolk, on the first Tuesday of January next: then and there in our said court to answer unto A. B., of Dedham, in our county of Norfolk, in an action of contract. [Here follows the declaration, if it is inserted in the writ.]

To the damage of the said A. B. (as he says) the sum of one thousand dollars, which shall then and there be made to appear with other due damages. And have you there this writ with your doings therein.

Witness, L. F. B., Esquire, at Boston, the first day of December, in the year of our Lord one thousand eight hundred and sixty-eight.

J. A. W., Clerk.

The plaintiff or his attorney may direct the officer to serve a writ in the foregoing form either by attachment or arrest, and the officer must follow out the instructions, if it is in his power to do so. See Gen. St. c. 123, s. 107.

The second form mentioned in this section, namely, the original summons with an order to attach the goods or estate, is like the preceding form, except that the words "*for want thereof to take the body of*" are struck out, and the word "*summon*" inserted in their place, and also the words "*and him safely keep so that you have him*" struck out, and the words "*to appear*" inserted in their place. As to whether this form can properly be used in any cases except those mentioned in section 12, see *Cooke v. Gibbs*, 3 Mass. 193. See also the

Report of the Commissioners on the Revised Statutes. Notes on c. 90, s. 1-9.

As to form of writs of attachment in actions against executors and administrators for debts due from the deceased testator or intestate, see Gen. St. c. 128, s. 5.

The third form mentioned in this section, namely, the original summons without an order of attachment, begins as follows: "*We command you to summon C. D. of Boston, in said county, merchant, (if he may be found in your precinct) to appear before our justices,*" &c. The rest is like the form given above.

SECT. 11. The form of a separate summons is as follows:—

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

*To C. D., of Boston, within our County of Suffolk, merchant, greeting:*

[SEAL OF COURT.]

We command you to appear at our next Superior Court, to be holden at Boston, within and for our county of Suffolk aforesaid, on the first Tuesday of January next, then and there to answer to A. B., of Dedham, in our county of Norfolk, in an action of contract, which action the said plaintiff has commenced against you, to be heard and tried at the said court; and your goods and estate are attached to the value of one thousand dollars for security to satisfy the judgment which the said plaintiff may recover upon the aforesaid trial. Fail not of appearance at your peril.

Witness, L. F. B., Esquire, at Boston, the first day of December, in the year of our Lord one thousand eight hundred and sixty-eight.

J. A. W., Clerk.

This section does not apply to the service of trustee writs. *Belknap v. Gibbens*, 13 Met. 471, 475. See also Gen. St. c. 142, s. 5.

SECTS. 12, 14, and 15. For the reason for these sections, see *Cooke v. Gibbs*, 3 Mass. 193, 196. Also the Report of the Commissioners on the Revised Statutes. Notes on c. 90, ss. 1-9.

SECT. 16. "*If duly served.*" Where a summons for a defendant, sued under a fictitious name, was left at a house where he and others boarded, it was held that the service was insuffi-

cient, even though the summons was really seen by him. *Fitzgerald v. Salentine*, 10 Met. 436, 438.

SECT. 18. For form of subpoena on bills in equity, see the chancery rules of the supreme court, rule 1.

SECT. 20. This section does not apply to a bastardy process. *Woodman v. Jarvis*, 12 Gray 190.

*"Shall before the entry thereof be indorsed."* Though the writ is not indorsed, yet the defendant must make the objection at the first term, or he will be held to have waived it. *Carpenter v. Aldrich*, 3 Met. 58

The words "*Office of A. B.*," or "*From the office of A. B.*," written on the back of a writ by an attorney, or stamped thereon by him or by his authority, have been held to constitute a sufficient indorsement under this section. *Slate v. Ackley*, 8 Cush. 98. — *Seagrave v. Erickson*, 11 Cush. 89. — *Wheeler v. Lynde*, 1 Allen 402. The indorser of a writ under this section is not discharged from his liability by the removal of the plaintiff into this state during the pendency of the suit, and by his continuing thenceforward to reside here. *Proprietors of the Locks and Canals on the Merrimac River v. Reed*, 8 Met. 146.

*"In case of avoidance or inability of the plaintiff."* As to what is sufficient proof of such "avoidance or inability," see *Wixon v. Lapham*, 5 Allen 206. — *Davis v. Whithead*, 1 Allen 276. — *Proprietors of the Locks and Canals on Merrimac River v. Reed*, 8 Met. 146, 149. — *Ruggles v. Ives*, 6 Mass. 494.

As to the necessary averments in a writ of scire facias against an indorser, see *M'Gee v. Barber*, 14 Pick. 212.

Provision for indorsement of writs, after entry, in cases of accidental omission, &c. St. 1865, c. 45.

*Service on the Defendant.*

SECT. 21. "*Original writs.*" Scire facias to hear errors is an original writ. *Christian v. Commonwealth*, 5 Met. 334.

SECT. 23. As to the service of trustee writs, see Gen. St. c. 142, s. 5. Also *Belknap v. Gibbens*, 13 Met. 471, 475.



SECT. 25. "*Last and usual place of abode.*" One who owned real estate on which he lived and where he carried on business in this state until the year 1841, when he removed to another state, where he afterwards continued to reside, was held to have in 1843 a last and usual place of abode in this state. *Tilden v. Johnson*, 6 Cush. 354.

Leaving a summons in the berth of the defendant in a vessel in which he has taken passage, and lies concealed, is no service. *Craig v. Gisborne*, 13 Gray 270. See note to Gen. St. c. 123, s. 16.

An officer's return upon a writ, showing an attachment of property and a service of a summons on the defendant by leaving it "at his last and usual place of abode known to me as such in said Boston," was held sufficient to support a judgment. Quære, as to the validity of the above return, if the words "as such" had been omitted. *Jones v. Walker*, 15 Gray 353. But where an officer makes a return on a writ that the defendant has no last and usual place of abode within his precinct, the defendant, notwithstanding such return, may show by evidence that he has such last and usual place of abode, in order to abate the writ, or to reverse a judgment thereon by writ of error. *Tilden v. Johnson*, 6 Cush. 354.

SECT. 26. A judgment against two defendants, one of whom was an inhabitant of another state and was not served with process, and whose property was not attached, and who did not authorize any appearance in his behalf, may be reversed as to him by writ of error, although the record states that, at the term at which the action was entered, "the defendants came by their attorney." *Bodurtha v. Goodrich*, 3 Gray 508. See also *Tilden v. Johnson*, 6 Cush. 354, 359.

SECT. 27. It is essential to the rendition of a valid judgment that the requirements of this section should be complied with. *Leonard v. Bryant*, 2 Cush. 32. Also *Leonard v. Bryant*, 11 Met. 370.

SECT. 28. This section applies whether the defendant was

ever an inhabitant of this state or not. *Thayer v. Tyler*, 10 Gray 164.

*"Entitled to further notice."* If such further notice is not given, a judgment rendered upon the default of the defendant and without an appearance by him or in his behalf, is erroneous, and may be reversed by a writ of error. *Packard v. Matthews*, 9 Gray 311. — *Johnson v. Thaxter*, 12 Gray 198. See also *Leonard v. Bryant*, 11 Met. 370.

SECT. 29. This section was repealed and superseded by St. 1865, c. 136.

*Attachment of Property. General Provisions.*

SECT. 32. *"Goods and chattels liable to be taken on execution."* As to what articles are exempt from seizure on execution, see Gen. St. c. 133, s. 32.

*"Except such goods and chattels," &c.* The general rules as to what goods and chattels may or may not be attached, are taken from the rules of the common law respecting distresses for rent. These latter, however, have been changed in some particulars by our statutes, and have been also modified in some degree by the practice as recognized and established in our courts. The statute provisions on this subject are found in Gen. St. c. 133; it being an obvious and well settled rule that nothing can be attached which cannot be taken on execution. But there are some goods and chattels, which, though liable to be taken on execution, cannot be attached or distrained. Thus certain personal property cannot be attached while it is in the actual possession and use of the defendant, and one reason for this is, that an attachment in such cases would be likely to result in a collision and breach of the peace. This rule has been applied only to things of comparatively small value, and such as could not be taken without great inconvenience, as beasts, tools, and wearing apparel, and it seems it does not apply to articles of luxury, or articles of great value, such as ships, steamboats, or stage coaches. *Mack v. Parks*, 8 Gray 517, 520. — *Potter v. Hall*, 3 Pick. 368, 374. — Com-

missioner's Report on Revised Statutes, notes on chapter 90 s. 23. By the common law, goods which could not be returned in the same plight in which they were taken, were not liable to be distrained; and in accordance with this principle it has been held, that hides in the vats of a tanner are exempt from attachment. *Bond v. Ward*, 7 Mass. 123. So, formerly, hay in the cock or barn, and sheaves of grain, unless found in a cart, were not liable to distress; but it has been held in this state that, inasmuch as changes in the condition of husbandry have done away with the reasons on which the old rule of the common law was founded, hay in a barn is liable to attachment, and may be removed by the officer for safe-keeping. *Campbell v. Johnson*, 11 Mass. 184. But see Gen. St. c. 133, s. 32, fourth clause.

SECT. 42. "*For thirty days.*" In computing the thirty days, the day on which final judgment is rendered is not to be counted. *Portland Bank v. Maine Bank*, 11 Mass. 204.

SECT. 45. This section includes attachments by trustee process, and in case such an attachment is dissolved under it, the trustee is, upon motion, entitled to a discharge and to costs against the plaintiff. *Wilmarth v. Richmond*, 11 Cush. 463.

"*The attachment shall be dissolved.*" A bond given to dissolve an attachment is binding after the death of the debtor, notwithstanding the provisions of this section. *Gass v. Smith*, 6 Gray 112, 114.

*Attachment of Real Estate and Leasehold Estates.*

SECT. 50. If real estate is attached, which is already subject to encumbrances by mortgage, attachment, lease, builder's lien, or otherwise, the attachment is of the fee, subject to such encumbrances; and if they are discharged or extinguished before seizure on execution, the attachment then holds the fee simple unencumbered. *Norton v. Babcock*, 2 Met. 510, 514. — *Forster v. Mellen*, 10 Mass. 421. — *Bradley v. Fuller*, 23 Pick. 8.

SECT. 51. For provisions, similar to those embraced in this

and the two following sections, relating to a levy of execution upon lands not attached on mesne process, see St. 1862, c. 190.

An omission to comply with the provisions of this section can be taken advantage of only by those who subsequently purchase or attach the estate (*Coffin v. Ray*, 1 Met. 212. — *Pomroy v. Stevens*, 11 Met. 244), and it seems that even such persons cannot take advantage of it, if it is proved that they had actual notice of the fact of the attachment. *Houghton v. Bartholomew*, 10 Met. 138, 143. But see *Denny v. Lincoln*, 13 Met. 200, 202.

SECT. 53. "*He shall also enter in a book.*" Such entry is competent evidence to prove the existence of an attachment. *Metcalf v. Munson*, 10 Allen 491, 493.

SECT. 54. "*Three days.*" Sundays and fractions of a day are to be excluded in reckoning the time. *Hannum v. Tourtellot*, 10 Allen 494.

As against a bonâ fide purchaser for a valuable consideration the attachment takes effect only from the time of filing the copy in the clerk's office. St. 1860, c. 70.

SECT. 55. Although the officer attaching real estate fraudulently conveyed away by the defendant, does not make a return as provided in this section, the attachment will nevertheless be valid as against the grantee in such fraudulent conveyance, or as against the assignee in insolvency of such grantee. *Pratt v. Wheeler*, 6 Gray 520.

As to the origin of the provisions of this section, see *Livermore v. Boutelle*, 2 Gray 217, 220.

*Attachment of Goods, &c., which cannot be removed.*

SECT. 57. "*Articles of personal estate which by reason of bulk,*" &c. This has been held to include such articles as "fifty tons of pig-iron," "wood and charcoal in large quantities," and "glass in plates three or four feet square, and from half an inch to an inch in thickness, some of it in boxes of five or six hundred pounds each, and some of it unboxed." *Scovill v.*

Root, 10 Allen 414. — Reed v. Howard, 2 Met. 36. — Polley v. Lenox Iron Works, 4 Allen 329.

If personal property is attached in accordance with the provisions of this section, and the officer is not guilty of misconduct or neglect, he is not responsible, even though cautioned to be careful, if without his consent and knowledge the property is afterwards carried away, so that it cannot be found to be taken on execution. Hubbell v. Root, 2 Allen 185. — Scovill v. Root, 10 Allen 414. See also Shephard v. Butterfield, 4 Cush. 425.

*Attachment, &c., of Personal Property Mortgaged or Pledged.*

SECT. 62. "*Subject to a mortgage.*" Personal property which is subject to a mortgage to secure future or contingent liabilities may be attached. See Haskell v. Gordon, 3 Met. 268. — Codman v. Freeman, 3 Cush. 306. — Hills v. Farrington, 6 Allen 80.

"*May be attached and held.*" But such property cannot be taken on execution, unless it has been previously attached on mesne process. Lyon v. Coburn, 1 Cush. 278.

The provisions of this and the following sections, requiring a demand by a mortgagee, apply only to an attachment of goods by actual seizure, and hence do not cover an attachment by trustee process. Putnam v. Cushing, 10 Gray 334. Neither do they cover attachments under a process from a United States court. Howe v. Freeman, 14 Gray 566.

SECT. 63. "*Shall, when demanding payment of the money due to him, state in writing a just and true account of the debt or demand,*" &c. The following will serve for a form of demand by a mortgagee under this section.

*To A. B., Deputy Sheriff.*

SIR, — I hereby demand of you the sum of five hundred dollars, with interest thereon, at seven per cent, from 1st July last, which is the amount now due me on a mortgage given to me by C. D., dated 1st January, 1868, and recorded with the mortgages of personal property for the city of Boston, libro 10, folio 50, which mortgage covers the horse, wagon, and harness now held by you on attachment as the property of the said C. D.

BOSTON, 10 January, 1869.

X. Y.

As to the form of demand when the property is held as security against future or contingent liabilities, see *Codman v. Freeman*, 3 Cush. 306. — *Haskell v. Gordon*, 3 Met. 268.

Either an express or an implied demand of payment must be made. But a notification to deliver up property, alleging it to be subject to a mortgage, which is described, and stating the amount due on such mortgage, is sufficient as containing an implied demand. *Moriarty v. Lovejoy*, 23 Pick. 321. — *Brewster v. Bailey*, 10 Gray 37.

It is not necessary to allege that the amount demanded is a "just and true account." *Gassett v. Sanborn*, 8 Gray 218.

If the demand exceeds the amount due, or includes a debt not covered by the mortgage, it will be invalid unless it appears that the error was the result of accident or mistake, and that the value of the property attached was less than the just and true sum for which it was pledged, so that the attaching creditor was not injured thereby. *Rowley v. Rice*, 10 Met. 7. — *Harding v. Coburn*, 12 Met. 341. — *Hills v. Farrington*, 6 Allen 80. — s. c. 3 Allen 427.

The amount *remaining unpaid* on the mortgage must be stated. *Sprague v. Branch*, 3 Cush. 576. — *Brewster v. Bailey*, 10 Gray 37. The date from which the interest is due and the rate should also be stated, but it is not necessary to compute the amount. *Averill v. Irish*, 1 Gray 254. In a case where the mortgagee did not have the means of computing the interest exactly, and understated it, it was held that the account was not thereby rendered untrue. *Johnson v. Sumner*, 1 Met. 172.

Where the sum secured by a mortgage is made up of several items, it has been held sufficient to state the aggregate amount, especially where the particular items are not called for. *Hills v. Farrington*, 6 Allen 80. — s. c. 3 Allen 427. But see *Johnson v. Sumner*, 1 Met. 172.

It seems that the mortgagee may properly demand the full amount due on his mortgage, even though he is himself in possession of a part of the mortgaged property which has not

been attached. *Rhode Island Central Bank v. Danforth*, 14 Gray 123.

When a mortgagor gave to the same mortgagee two mortgages covering different articles, all of which were attached, it was held that a demand for the money due under both mortgages might be good as to one mortgage, although it was bad as to the other, the statement of the amount due thereon being incorrect. *Simonds v. Parker*, 8 Met. 144.

It is not necessary to enumerate specifically the articles mortgaged or pledged, and a general description has been held to be good, although it embraced the whole of the property attached, whereas only a part thereof was actually liable for the debt demanded. *Harding v. Coburn*, 12 Met. 333. — *Codman v. Freeman*, 3 Cush. 306. — *Jones v. Richardson*, 10 Met. 481. — *Averill v. Irish*, 1 Gray 254. If there is no particular description of the property, it seems to be necessary that it should, at least, be alleged that the property attached is identical, either in whole or in part, with that mortgaged or pledged. *Moriarty v. Lovejoy*, 23 Pick. 321. — *Harding v. Coburn*, 12 Met. 333, 340.

In the case of one who held a mortgage upon goods which formed part of a stock kept for sale in a shop, and which were intermingled with other goods of a like character, it was held that he might enforce his claim against an officer who attached the whole stock on a writ against the mortgagor, if, with the aid of the mortgagor and having the goods before them for examination, he could identify and point out to the officer those which were covered by his mortgage; but that, if the officer refused to comply with the mortgagee's demand of payment and sold the whole of the attached property, the fact that the mortgagee after such sale was unable to produce evidence to distinguish the specific articles covered by his mortgage, would not be a good defence to an action of tort against such officer for damages. *Morrill v. Keyes*, 14 Allen 222.

As long as the property is in the lawful custody and posses-

sion of the officer, it is liable to successive attachments, and when such attachments are made, each creditor has a right to notice and demand of the mortgage debt, and to the full time of ten days in which to pay it. Consequently a demand does not affect attachments made subsequently to it, but is good as against all previous attachments, unless it is expressly limited to a particular case or cases. *Wheeler v. Bacon*, 4 Gray 550. — *Howe v. Bartlett*, 1 Allen 29. — *Macomber v. Baker*, 3 Allen 241.

The mortgagee must make his demand within a *reasonable time*. When the demand was not made until ten months after the seizure, and no good cause was shown for the delay, it was held that there was a lack of reasonable diligence. *Brackett v. Bullard*, 12 Met. 308. For other cases on this point, see *Johnson v. Sumner*, 1 Met. 178. — *Housatonic Bank v. Martin*, 1 Met. 294. — *Legate v. Potter*, 1 Met. 325. — *Tapley v. Butterfield*, 1 Met. 515. — *Whitwood v. Kellogg*, 6 Pick. 420. — *Crosby v. Baker*, 6 Allen 295. A sale of the property by the attaching officer does not render invalid a demand made subsequently, though within a reasonable time. *Legate v. Potter*, 1 Met. 325. — *Tapley v. Butterfield*, 1 Met. 515.

A good demand may be made, although the mortgage was given to secure a note payable on demand, and the mortgagee had never demanded payment, and although the mortgagor was, by the provisions of the mortgage, entitled to retain possession of the goods until condition broken. *Alden v. Lincoln*, 13 Met. 204.

A demand is necessary, although the mortgage provides that in case of attachment the mortgagee may take immediate possession. *Wing v. Bishop*, 9 Gray 223.

When one of several mortgagees, waiving his right under the mortgage, attached the property to secure his debt, it was held that the remaining mortgagees could not maintain an action of replevin without first making a demand as required in the statute. *Buck v. Ingersoll*, 11 Met. 226.



If, after an attachment has been made, the mortgagee sells a part of the property and applies the proceeds to the satisfaction of his debt, or assigns his mortgage and records the assignment, he cannot then make a valid demand upon the attaching creditor or officer. *Granger v. Kellogg*, 3 Gray 490. — *Horne v. Briggs*, 98 Mass. 510.

*"And the property shall be restored to him."* As to the form of action in case the money is not paid, nor the property restored, see *Alden v. Lincoln*, 13 Met. 204, 208.

SECT. 64. Where a mortgagee demanded payment of a claim, which he knew to be wholly false, and thereby induced the creditor to abandon his attachment and thus lose his debt, it was held that the creditor might recover damages in an action for deceit. *Brown v. Castles*, 11 Cush. 348.

SECT. 67. *"And the mortgagee or his assigns may be summoned," &c.* After the property has been attached, and the mortgagee summoned as trustee, he cannot give notice and foreclose the mortgage. *Hobart v. Jouvett*, 6 Cush. 105.

*"The amount due thereon."* A mortgage given to secure future claims is not a valid security for claims accruing after the property is attached and the mortgagee summoned. *Barnard v. Moore*, 8 Allen 273. — *Codman v. Freeman*, 3 Cush. 306.

The writ in proceedings under this section must be served on the mortgagor in the same manner as on the principal defendant in the regular trustee process. *Kent v. Lee*, 9 Gray 45.

If the mortgagee is discharged, the attachment is thereby dissolved. *Martin v. Bayley*, 1 Allen 381. — *Hayward v. George*, 13 Allen 66.

*Sale by consent of Personal Property Attached.*

SECT. 72. *"And the debtor and all the attaching creditors consent in writing."* The fact that the debtor agrees in writing to the sale of the property, and that it is sold accordingly, does not prevent the attachment from being dissolved by his death. *Kingsbury v. Baker*, 17 Pick. 429.

*"Shall sell it in the manner," &c.* Even if the property is sold before the return day of the writ, it is not necessary that the officer should make such sale a part of his return. *Eastman v. Eveleth*, 4 Met. 137, 145.

*"The proceeds of the sale."* When goods under attachment are mortgaged, and notice of the mortgage given to the attaching officer, and the mortgage is duly recorded, if they are sold under this section and an entry of "neither party" is afterwards made in the action in which they are attached, the proceeds of the sale in the officer's hands belong to the mortgagee. *Appleton v. Bancroft*, 10 Met. 231.

*"Shall be held by the officer," &c.* When a sale is made, the officer is liable, in an action for money had and received, to the party entitled to the proceeds, and cannot be permitted to show in defence that he has received no money, nor any equivalent therefor. *Appleton v. Bancroft*, 10 Met. 231. For other cases in regard to the liability of the officer, see *Wheelock v. Hastings*, 4 Met. 504. — *New Hampshire Savings Bank v. Varnum*, 1 Met. 34. — *Crocker v. Baker*, 18 Pick. 407.

As to the effect of a sale under this section upon the rights of the parties in case of an assignment in insolvency of the defendant's property, see *Wheelock v. Hastings*, 4 Met. 504. — *Eastman v. Eveleth*, 4 Met. 137, 147. — *Edwards v. Sumner*, 4 Cush. 393.

*Perishable Property Attached.*

SECT. 73. The provisions of this and the following sections do not apply to an attachment on a vessel to enforce a lien thereon. *Coburn v. Clark*, 3 Allen 207.

SECT. 74. *"Three disinterested persons."* A brother of the attaching creditor is not a disinterested person within the meaning of the law. If the appraisers are not all disinterested persons, the officer becomes liable as a trespasser ab initio, if he makes a sale of the property. *McGough v. Wellington*, 6 Allen 505.

SECT. 77. *"The goods shall thereupon be sold by the officer."*

An appraisal made according to the statute conclusively justifies the officer in making a sale. *Crocker v. Baker*, 18 Pick. 407, 411.

SECT. 78. "*Or giving bond.*" The bond of a person other than the debtor may be taken, provided, &c. (St. 1868, c. 285.) St. 1869, c. 436.

*Joint Personal Property Attached on a Writ against Part-owner.*

SECT. 87. If none of the part-owners avail themselves of the benefits of this and the following sections, the whole property must remain in the possession and custody of the officer. *Reed v. Howard*, 2 Met. 36, 40.

SECT. 88. "*Upon his giving bond.*" The bond of a person other than the part-owner may be taken, provided, &c. (St. 1868, c. 285.) St. 1869, c. 436.

*Attachments disputed by Persons having subsequent Liens, &c.*

SECT. 92. "*Subsequent attachment, purchase,*" &c. The word "subsequent" limits the words "or in any other manner," as well as the words "attachment, purchase, or mortgage." *Pierce v. Richardson*, 9 Met. 69.

"*Not justly due.*" Where a note was made without the knowledge of the payee, who was liable as a surety for the maker for a debt due but not paid, against which liability the maker had promised to secure him, and the maker caused his own property to be attached for the purpose of securing the note, it was held that the note did not, until assented to by the payee, constitute a debt "justly due" to him. But where the plaintiff was the holder of a note payable on demand, which the debtor promised originally to secure, and without the plaintiff's knowledge the debtor caused his own property to be attached for the purpose of securing the payment of the debt, it was held that a subsequent attaching creditor could not object to the validity of the prior attachment on the ground that the action was not commenced by the order of the plaintiff, and that his assent was not given to it till after the subse-

quent attachment had been made. *Baird v. Williams*, 19 Pick. 381, 384.

SECT. 95. The object of these provisions being to prevent collusion between the debtor and the person who makes the first attachment, a subsequent attaching creditor will not be confined to the grounds of defence of which the debtor might have availed himself. *Carter v. Gregory*, 8 Pick. 165. — *Strong v. Wheeler*, 5 Pick. 410.

SECT. 98. "*Reasonable costs.*" If the petition fails, the petitioner is liable for such costs as cannot be taxed against the defendant in the suit. He is liable for fees of witnesses summoned by the plaintiff on the trial of the petition, and also, it seems, for the travel and attendance of the plaintiff after the defendant is defaulted and while the petition is pending. He is also liable for the regular attorney's fee, but not for the counsel fees actually paid by the plaintiff in defending against the petition. *Guild v. Guild*, 2 Met. 229.

SECT. 99. The bond may be signed by a person other than the petitioner, provided, &c. St., 1869, c. 436.

SECT. 102. This section excludes the application of the preceding sections in all cases where either the prior or the subsequent attachment was made in an action commenced before a justice of the peace or a police court. *Putnam v. Bixby*, 6 Gray 528.

*Dissolution of Attachments by Giving Bond.*

SECT. 104. "*By giving bond with sufficient sureties.*" Such a bond does not require any internal revenue stamp. *Sampson v. Barnard*, 98 Mass. 359. The sureties will not be discharged by the commitment of the defendant on execution after breach of the condition of the bond, and, if the defendant is afterwards discharged on taking the poor debtor's oath, the obligee will be entitled, in an action against the sureties, to judgment and execution for the amount recovered in the action in which the attachment was made. *Murray v. Shearer*, 7 Cush. 333.

*"With condition to pay the plaintiff the amount, &c., within thirty days after the final judgment in such action."* When the defendant goes into insolvency and obtains his discharge during the pendency of the action, no judgment can be obtained against him, if his discharge be properly pleaded, and consequently the condition of the bond will not be broken, and the sureties will not become liable thereon. *Loring v. Eager*, 3 Cush. 188.

But the death of the defendant, the appointment of an administrator of his estate, and the representation of his estate as insolvent, will not prevent the plaintiff, after summons to the administrator and his failure to appear, from taking a judgment against the goods and estate of the deceased defendant in the hands of the administrator, and such judgment will fix the liability of the sureties on the bond. *Gass v. Smith*, 6 Gray 112.

An attachment may also be dissolved by giving a bond to pay the value of the *property attached*. See St. 1867, c. 137.

The bond may be signed by a person other than the defendant, provided, &c. (St. 1868, c. 285.) St. 1869, c. 436.

*When Officer to Attach or Arrest.*

SECT. 107. If the plaintiff orders the officer to attach certain specified property, and such property is afterwards proved to belong to a stranger, it seems that the plaintiff will be held liable to the officer for all damages recovered against him. *Marshall v. Hosmer*, 4 Mass. 60. — *Humphreys v. Pratt*, 2 D. & Cl. 288.

## CHAPTER CXXIV.

### OF ARREST, IMPRISONMENT, AND DISCHARGE.

*Arrest on Mesne Process and Execution.*

SECT. 1. The affidavit must conform strictly to the requirements of the statute. The omission of the words "and has reason to believe" would be fatal to the validity of the arrest.

In re Henry D. Stone, Monthly Law Reporter, vol. 22, page 599. An affidavit for the arrest of "the defendant" in a writ against two defendants, without showing which of the two is intended, is insufficient to authorize the arrest of either. *Hitchcock v. Baker*, 2 Allen 431.

SECT. 2. "*And that he has reason to believe that the defendant is likely to remove beyond the jurisdiction,*" &c. An affidavit which stated that the deponent "believes and has reason to believe that the defendant *intends* to leave the state, so that execution, if obtained, cannot be served upon him," was held insufficient, on the ground that a person may *intend* to do that which it is not *likely* that he will do. *Wood v. Melius*, 8 Allen 434.

If a person causes another to be arrested, without first making the required affidavit, he will be liable to an action of tort therefor. *Cody v. Adams*, 7 Gray 59.

SECT. 5. "*No person shall be arrested on an execution.*" As to arrest in the case of an execution against two or more, see *Dooley v. Cotton*, 3 Gray 496.

"*Except in actions of tort.*" Certain cases of scire facias or other suit against bail or sureties in criminal cases are also excepted. St. 1862, c. 169, s. 2.

"*Some magistrate.*" If the magistrate is at the same time the attorney of the judgment creditor in the action in which the execution issued, the arrest is unlawful. *McGregor v. Crane*, 98 Mass. 530.

"*First. That the debtor,*" &c. This section has been amended by inserting before these words, the words "that he believes and has reason to believe." St. 1866, c. 215, s. 1. *Stone v. Carter*, 13 Gray 575. — *Abbott v. Tucker*, 4 Allen 72.

"*Which he does not intend to apply to the payment of the plaintiff's claim.*" An affidavit which omitted these words was held to be insufficient. *Stone v. Carter*, 13 Gray 575.

An affidavit upon an execution against two defendants, which states that "the defendants, A. and B. *has* property," &c.,

"which *he does* not intend to apply," &c., is to be construed distributively, so as to include each of the defendants, and is not rendered invalid by the defect in grammar. *Abbott v. Tucker*, 4 Allen 72.

SECT. 6. "*An execution issued for costs only.*" This section applies to real as well as to personal actions. Where an execution, issued upon a judgment founded on a writ of entry to foreclose a mortgage, recited that the sum recovered was for "costs and damages," it was held that such recital would not of itself render an affidavit necessary, it being impossible to recover any damages in such an action. *Hildreth v. Brigham*, 12 Allen 71.

SECT. 7. For provisions in regard to female judgment debtors, see St. 1862, c. 162.

*Discharge of Persons Arrested on Mesne Process and Execution.*

SECT. 9. "*Police court.*" Under this statute a special justice of a police court, except in Boston, has authority to act in case of the disability of the justice. *Dike v. Story*, 7 Allen 849.

SECT. 10. "*May take his recognizance.*" If the arrest was unlawful, the recognizance will be void. *McGregor v. Crane*, 98 Mass. 530. It is not necessary to state in the recognizance that the debtor does not desire any time fixed for his examination. Such recognizance need not be returned into a court of record. *Thacher v. Williams*, 14 Gray 324.

As to the form of the recognizance, see also *Adams v. Stone*, 18 Gray 396. — *Adams v. Brown*, 14 Gray 579. — *Commonwealth v. Cutter*, 98 Mass. 31. See also St. 1869, c. 436.

After a debtor arrested on execution has applied to a proper magistrate to have a time and place fixed for his examination, and they have been fixed accordingly, and notice given to the creditor, another magistrate has no jurisdiction, unless the former application is withdrawn, to take a recognizance that the debtor will deliver himself up for examination within thirty

days; and a recognizance so taken will be void. *Snelling v. Coburn*, 10 Allen 344.

*"In a sum not less than double the amount of the execution,"* *fc.* The recognizance may be taken in a sum equal to double the amount of the execution or of the ad damnum, or in a greater sum, as the magistrate shall order. *Currier v. Poor*, 5 Allen 585.

The fee of twenty-five cents, for the execution, should not be neglected in computing the penal sum. *Thacher v. Williams*, 14 Gray 324. Since the debtor is in no way prejudiced, but rather benefited, by the fact that his recognizance is for a sum less than double the amount of the execution or of the ad damnum, he cannot object to its validity on that ground. *Thacher v. Williams*, 14 Gray 324, 327. See also *Whittier v. Way*, 6 Allen 288. — *Gilmore v. Edmunds*, 7 Allen 360.

It seems that the penal sum must be stated in dollars and cents. A recognizance taken "in the sum double the amount of the execution" which issued "for the sum of \$346.98 damage, and \$9.23 costs of suit," "together with interest from the rendition of said judgment, and twenty-five cents more for said execution," was held to be bad. *Adams v. Brown*, 14 Gray 579, 582.

*"He will deliver himself up for examination before some magistrate authorized to act."* When a competent magistrate agreed to be present at the time and place appointed, but neglected to do so, and in consequence thereof the examination was not had within the thirty days, it was held that the condition of the recognizance was broken. The debtor must act in such season as to guard effectually against the contingency of the casual absence or other inability of the magistrate or magistrates on whose services he relies, either for the purpose of giving legal notice to his creditor, or of presiding at the examination. It is no defence to an action on the recognizance that the debtor, on failing to find a magistrate, offered to deliver himself up to the officer who made the arrest, and that the



latter declared that he had returned the execution into court, and had no authority to take him. *Thacher v. Williams*, 14 Gray 324, 328. — *Adams v. Stone*, 13 Gray 396.

*"Giving notice of the time and place thereof, as herein provided."* As to the importance of having this clause inserted in the recognizance, see *Gilmore v. Edmunds*, 9 Allen 379.

*"And not depart without leave of the magistrate."* See *Skinner v. Frost*, 6 Allen 285.

*"Making no default at any time fixed for his examination."* An agreement made between a judgment debtor and his creditor during an adjournment, that the debtor shall pay and the creditor receive a certain sum monthly, to an amount less than the judgment, in full satisfaction thereof, will not relieve the debtor from the duty of appearing before the magistrate at the time fixed for the adjourned hearing; and if he fails so to appear, it will be a breach of his recognizance, for which his surety thereon will be liable. *Merrill v. Roulstone*, 14 Allen 511.

*"And abide the final order of the magistrate thereon."* The fact that the debtor did not abide the final order, may be proved by parol. *Peck v. Emery*, 1 Allen 463. If the magistrate refuses to administer the oath, the recognizance does not require the debtor to go in search of the officer for the purpose of delivering himself up. *Jacob v. Wyatt*, 10 Allen 236, 240. — *Russell v. Goodrich*, 8 Allen 150, 151. — *Skinner v. Frost*, 6 Allen 286. But the debtor must not depart until the certificate of such refusal is made according to Gen. St. c. 124, ss. 25, 26. *Lothrop v. Bailey*, 14 Allen 514.

After a recognizance is given under this section, if the creditor makes a contract, binding upon him either at law or in equity, to give more time to the debtor, the surety will be discharged thereby. But a gratuitous agreement to give more time was held not to discharge the surety, especially as it was conditional, and the condition was broken before the expiration of the thirty days. *Abbott v. Tucker*, 4 Allen 72.

Where a person, who had given a recognizance under this section, went into insolvency within the thirty days, it was held that he was still bound to deliver himself up for examination, and that, if he failed to do so, a subsequent discharge in insolvency would be no defence to an action against the sureties for breach of the condition of the recognizance. *Smith v. Randall*, 1 Allen 456, 460.

See also notes on Gen. St. c. 124, s. 17.

SECT. 12. "*The magistrate.*" This term includes only those classes of magistrates mentioned in section 9, and hence one justice of the quorum has no power to issue the notice provided for by this section. *Paul v. Holden*, 14 Allen 29. It need not, however, be the same magistrate who took the recognizance. *Elliott v. Willis*, 1 Allen 461. See also Gen. St. c. 124, s. 10.

"*The plaintiff or creditor.*" See *Follansbee v. Bird*, 8 Cush. 289.

"*To A——B——.*" A notice to a corporation, which did not describe it by its true name, but which was sent to the attorney of the corporation and acknowledged by him as notice to the corporation, was held sufficient. *Mutual Safety Life Insurance Company v. Woodward*, 8 Allen 148.

"*C——D——.*" The omission of the debtor's middle name was held not to invalidate a notice in which he was in other ways so distinctly described that there could be no doubt in the creditor's mind as to the person intended. *Collins v. Douglass*, 1 Gray 167. See *Van Kuran v. May*, 7 Allen 466.

"*Arrested on mesne process (or execution) in your favor.*" If the debtor has been so arrested in more than one suit, the notice must specify which suit is referred to. *Merriam v. Haskins*, 7 Allen 846.

A notice, in which the execution was described as issued from the Court of Common Pleas holden at Lowell, when in fact it was issued from that court holden at Boston, was held to be bad. *Shed v. Tileston*, 8 Gray 244.

*"Naming the day and hour and place."* Seven o'clock P. M. in January is not an unreasonable hour. *May v. Foote*, 7 Allen 354.

SECT. 13. *"The notice shall be served," &c.* Due service of the notice may be waived, and such waiver may be proved by parol, although the officer's return, showing a defective service, does not allude to the waiver. *Lord v. Skinner*, 9 Allen 376.

*"By any officer qualified," &c.* If the person who serves the notice is a constable de facto, his right to his office cannot be questioned in a suit in which he is not a party. *Elliott v. Willis*, 1 Allen 461.

In a suit upon the recognizance, a legal and sufficient return by the proper officer is conclusive as to the facts returned. *Niles v. Hancock*, 3 Met. 568. — *Collins v. Douglass*, 1 Gray 167, 171.

If the return states that service was made on a certain day without specifying the hour, and the fact is that the service was good if made before, but not if made after, a certain hour on that day, the return is not sufficient evidence of due service. *Park v. Johnston*, 7 Cush. 265. See also *Smith v. Randall*, 1 Allen 654.

*"His agent or attorney."* See *City Bank at Providence v. Fullerton*, 11 Met. 73, 77.

Where the creditor lived out of the state, but had two attorneys of record, partners in business, within the same, a return which stated that the notice had been served "by giving in hand an attested copy to Messrs. A. and B., his attorneys of record," was held to be good against the objection that the return showed but one copy, and that therefore there could not have been good service upon two persons. *Knight v. Fifield*, 7 Cush. 263.

*"Allowing not less than one hour."* When the notice is left at the last and usual place of abode, not less than twenty-four hours is to be allowed. St. 1861, c. 112.

*"At the rate of."* For a fraction of a mile an allowance of the corresponding fraction of an hour is all that is required. *Jacob v. Wyatt*, 10 Gray 236.

*"Travel."* The time to be allowed for travel is to be computed by the distance of the place of examination from the place of service. *Carroll v. Rogers*, 4 Allen 70.

*"The notice shall be served upon the agent or attorney, if he lives in the county or has his usual place of business therein."* If there is such agent or attorney, personal notice to a creditor, who does not reside within the county, is not sufficient. *Putnam v. Williams*, 2 Allen 73.

Where the attorney lived within the county, it was held that service upon him was good, although made at his place of business in another county. *Carroll v. Rogers*, 4 Allen 70.

*"If no such agent or attorney is found within the county, the notice may be served on the officer who made the arrest."* Service upon the officer in such case is not imperative, and the debtor has his choice between such service and service upon the creditor or his attorney or agent. *Way v. Carlisle*, 13 Allen 398.

Service upon the officer will be good, if neither the creditor nor his agent or attorney has a place of residence or of business within the county, although the agent or attorney may happen to be within the county. *Richardson v. Smith*, 1 Allen 541.

If the agent or attorney is temporarily absent from the county, or cannot be found upon reasonable search, service may be made upon the officer. *Hyatt v. Felton*, 9 Allen 378. — *May v. Foote*, 7 Allen 354.

SECT. 14. The fact that a prior notice has been given within the seven days, cannot be proved by a copy attested by an officer, if no reason for not producing the original is shown. *Richardson v. Smith*, 1 Allen 541.

SECT. 15. *"The magistrate who issued it or any other magistrate named in section one."* This section has been amended by striking out the words quoted, and inserting in place thereof

the words "some magistrate named in section nine." St. 1850, c. 215, s. 2.

*"Shall attend at the time."* Both the creditor and the debtor are to be allowed one hour from the time specified, within which to make their appearance. *Phelps v. Davis*, 6 Allen 287. — *Hobbs v. Fogg*, 6 Gray 251. — *Niles v. Hancock*, 3 Met. 568. As to whether the same margin is also to be allowed to the magistrate, see *Adams v. Stone*, 13 Gray 396, 400.

SECT. 16. *"The magistrate may adjourn the case."* This may be done before the expiration of an hour from the time appointed, although the creditor does not appear. See *May v. Foote*, 7 Allen 354.

The debtor should appear in person, but an appearance by attorney for the purpose of moving for an adjournment, may be allowed on showing satisfactory cause. In such a case, where the motion for adjournment was made within the hour, it was held that an order of adjournment was not invalidated by the fact that it was held under consideration until after the hour had expired and the creditor's attorney had departed. *Mann v. Mirick*, 11 Allen 29.

If the creditor appears at the time fixed, and remains more than an hour, and the debtor does not appear, either personally or by attorney, and there is no continuance or adjournment of the hearing, the magistrate has no jurisdiction thereafter to hear the case or discharge the debtor. In such case, the only way in which the debtor can procure his discharge, if at all, is by a new notice in due form. *Sweetser v. Eaton*, 14 Allen 157.

After the magistrate has announced his decision not to administer the oath, his authority and jurisdiction are ended, and if then, at the request of the debtor, he consents to an adjournment, instead of remanding the debtor to the custody of the officer, the debtor will not be bound by his recognizance to appear at the time and place of such adjournment. *Russell v. Goodrich*, 8 Allen 150.

One hour is allowed for the appearance of the parties at each

adjournment, as well as at the time originally fixed for the examination. *Phelps v. Davis*, 6 Allen 287. — *Sweetser v. Eaton*, 14 Allen 157.

SECT. 17. Under this section it is the duty of the debtor to give notice of the time and place of the examination as directed in sections 12 and 13, and the recognizance may properly require him to do so. *Whittier v. Way*, 6 Allen 288. As to the necessity of embodying such a clause in the recognizance, see *Gilmore v. Edmunds*, 9 Allen 379.

In an action upon a recognizance, taken under this section, the defendant cannot object that it was taken in a sum less than twice the amount of the execution or ad damnum, nor that the place and time fixed for the examination were not specified. *Whittier v. Way*, 6 Allen 288. — *Gilmore v. Edmunds*, 7 Allen 360.

For a case in which the name of the plaintiff was given erroneously in the recognizance, see *Mutual Safety Fire Insurance Company v. Woodward*, 8 Allen 148.

*"His recognizance."* See St. 1869, c. 436.

*"At the time fixed for his examination," &c.* In a case where the debtor made his appearance at the proper time, but left to get his account books, and did not return until after an hour from the time fixed had expired, it was held that it was competent for the magistrate to suspend the proceedings for a brief period, and that by resuming them again on the return of the debtor, he by implication sanctioned his absence as being for a legitimate purpose. *Toll v. Merriam*, 11 Allen 395, 397.

*"And abide the final order of the magistrate thereon."* If the debtor performs all that is required of him by the recognizance, and is discharged by the magistrate, there is no remedy on the recognizance, although the magistrate may have erred in regard to his duty. *Willis v. Howard*, 7 Allen 266. — *Skinner v. Frost*, 6 Allen 286.

After the magistrate has announced his decision, he has no further authority or jurisdiction in the case. *Russell v. Goodrich*, 8 Allen 150.

See also notes on Gen. St. c. 124, s. 10.

SECT. 21. "*The magistrate shall administer to him the following oath.*" If the creditor does not appear, and has not previously waived his rights, the oath must not be administered before the expiration of an hour from the appointed time. Lord v. Skinner, 9 Allen 376. — Hobbs v. Fogg, 6 Gray 251.

SECT. 22. "*A certificate.*" This certificate is not conclusive evidence that the debtor has caused the creditor to be legally notified, and if in fact he has not, the creditor may maintain an action on the recognizance. Smith v. Randall, 1 Allen 456, 460. — Hobbs v. Fogg, 6 Gray 251. — Young v. Capen, 7 Met. 287. See also Skinner v. Frost, 6 Allen 286. — Willis v. Howard, 7 Allen 266. — Van Kuran v. May, 7 Allen 466.

*Imprisonment.*

SECT. 25. "*And the defendant shall be conveyed to jail.*" Russell v. Goodrich, 8 Allen 150. See notes on Gen. St. c. 124, s. 10.

"*And the oath for the relief of poor debtors is refused him.*" The debtor has no appeal from the decision of the magistrate. Russell v. Goodrich, 8 Allen, 150, 151. — Fletcher v. Bartlett, 10 Gray, 491. See notes on section 32.

SECT. 26. "*Of which refusal a certificate shall be annexed to the execution.*" Until this is done, the debtor's recognizance, binding him to abide the final order of the magistrate, does not require him to surrender himself to the officer. Stone v. Russell, 11 Gray 226. See notes on Section 10.

"*He shall be conveyed to jail.*" When an officer, at the request of the judgment creditor, committed a debtor on execution to the county jail which was farthest from his residence, although requested by the debtor to commit him to a nearer jail, it was held that such officer was not liable to an action by the debtor for abuse of his authority. See Woodward v. Hopkins, 2 Gray 210.

"*Or the execution is satisfied.*" See Cheney v. Whitely, 9 Cush. 289, 290.

See notes on the preceding section.

SECT. 29. "*A legal claim against his goods and estate.*" See *Cheney v. Whitely*, 9 Cush. 289, 290.

*Punishment of Fraudulent Debtors.*

SECT. 31. "*When either of the charges named,*" &c. As to whether the sufficiency of the charges is to be judged by the rules of civil or of criminal practice, see *Brown v. Tobias*, 1 Allen 385, 388. — *Chamberlain v. Hoogs*, 1 Gray 172, 174.

SECT. 32. "*Either party may appeal.*" In a case where a magistrate refused to administer the oath, and also found the debtor guilty of charges of fraud, it was held that an appeal from the decision of the magistrate did not carry up the whole case, but only the finding upon the charge of fraud. *Fletcher v. Bartlett*, 10 Gray 491.

If the decision of the examining magistrate is that the charges are not supported, it is his duty, although the creditor appeals, to administer the oath to the debtor, and the debtor is thereby discharged from imprisonment; or, if the debtor is at large, on bail, his bail are thereby discharged from their liability. *Ingersoll v. Strong*, 9 Met. 447. — *Collamore v. Fernald*, 3 Gray 318.

Gen. St. c. 129, s. 79, in regard to motions in arrest of judgment, does not apply to proceedings on charges of fraud. *Chamberlain v. Hoogs*, 1 Gray 172.

SECT. 33. "*He shall, before the allowance of the appeal, recognize.*" The right to move for the dismissal of the appeal, on the ground that no recognizance has been given, is waived if not exercised before the rendition of final judgment. *Brown v. Tobias*, 1 Allen 385, 388.

SECT. 34. "*He shall have no benefit from the proceedings under this chapter.*" But see *Ingersoll v. Strong*, and *Collamore v. Fernald*, cited above, under sect. 32.

*Discharge of Persons Imprisoned on Warrants of Distress in favor of the State.*

SECT. 36. "*If he represents to the jailer.*" Where a debtor, who, under an earlier statute similar in terms to this section,



had given a bond for the prison limits, made application *directly* to the magistrate, and was admitted to take the oath, and thereupon went without the prison limits, it was held that the application was not legally made, and that the condition of the bond was broken. *Bruce v. Keogh*, 7 Cush. 536.

*Special Provisions for Persons in Prison or on Bail in Civil Actions, where Judgment is recovered against them.*

SECT. 40. "*Giving to the creditor a bond.*" Such bond may be signed by a person other than the debtor, provided, &c. (St. 1868, c. 285.) — St. 1869, c. 436.

SECT. 43. "*Giving to the creditor a bond.*" Such bond may be signed by a person other than the debtor, provided, &c. (St. 1868, c. 285.) — St. 1869, c. 436.

*Remedy on Recognizances and Bonds, and for Escapes.*

SECT. 46. "*By action of contract.*" If the declaration in such action sets forth all the facts necessary to give jurisdiction to the magistrate by whom the recognizance was taken, it is sufficient without an express allegation that he had jurisdiction. *Commonwealth v. Cutter*, 98 Mass. 31.

As to what evidence is necessary in order to make out a *prima facie* case, see *Blake v. Mahan*, 2 Allen 75.

SECT. 47. "*Whether the escape be negligent or voluntary.*" If the officer negligently or voluntarily allows a person arrested on execution to escape, he cannot arrest him again on the same execution. *Houghton v. Wilson*, 10 Gray 365. — *Doane v. Bartlett*, 4 Allen 74, 77. — *Doane v. Baker*, 6 Allen 260.

"*Such damages as he has suffered by the escape.*" In an action under a similar statute, the judge refused to instruct the jury "that the plaintiff was entitled to recover the whole amount of his debt, unless the defendant proved the debtor's inability to pay the same;" but instructed them that the plaintiff was entitled to recover only such an amount of damage as they should find upon all the evidence in the case that he had sustained by the escape; and to this ruling it was held that

the plaintiff had no ground of exception. *Chase v. Keyes*, 2 Gray 214.

*Fees.*

SECT. 48. "*For approving sureties and taking a recognizance after arrest, one dollar.*" This fee is increased to \$1.50, and the same fee allowed, if the sureties are refused. St. 1866, c. 193, s. 1.

"*Two dollars.*" This is increased to \$3, and a further fee of \$1 is allowed on any notice or certificate required to be made or issued by the magistrate under this chapter. St. 1866, c. 193, s. 1.

"*Shall pay these fees in advance.*" The magistrate may bring a suit for his fees, if they are not paid in advance, and the invalidity of the recognizance cannot be shown in defence, if the defendant suffered no loss or injury in consequence of the supposed defect. *Townsend v. Way*, 3 Allen 245.

"*Without examination.*" If a debtor is entitled under this provision to a discharge without an examination, his discharge will not be rendered invalid by the fact that, before receiving it, he took the oath. *Hyatt v. Felton*, 9 Allen 378. — *Phillips v. Gray*, 1 Allen 492.

## CHAPTER CXXV.

### OF BAIL.

#### *Taking Bail.*

SECT. 1. Under this section a defendant arrested on mesne process is entitled to his release on giving bail, even though he has been refused the poor debtor's oath. *Wass v. Bartlett*, 10 Gray 490.

SECT. 2. "*By a bond.*" A bail bond in which the christian names of both the plaintiffs were given wrong, but which contained a further description of them by their firm name, was held to be sufficient. *Colburn v. Downes*, 10 Mass. 20.

The bond may be signed by a person other than the defendant, provided, &c. (St. 1868, c. 285). — St. 1869, c. 436.

*"To the sheriff."* The bond is void, if made out to the deputy sheriff. *Conant v. Sheldon*, 4 Gray 300. When bail is taken by a deputy sheriff, it must be by a bond to his own superior, the sheriff of the same county. A bond to the sheriff of another county is void, although the action, in which bail is taken, be brought in that county. *Smith v. Adams*, 12 Met. 564.

SECT. 5. *"The persons who execute it."* Such persons will be bound, although they are not citizens of this commonwealth, and have no real estate here. *Glezen v. Rood*, 2 Met. 490.

SECT. 6. The omission of the officer to perform the duties required of him by this section renders him liable to an action, but if he delivers or offers to deliver the bail bond to the plaintiff in season for him to prosecute a scire facias against the bail, he will be liable for nominal damages only. *West v. Rice*, 9 Met. 504. — *Glezen v. Rood*, 2 Met. 490.

SECT. 7. *"And a return on the execution that he is not found."* Such return cannot be made until the return day of the execution. *Niles v. Field*, 2 Met. 327. — *Rowland v. Seymour*, 2 Met. 590. — *Bull v. Clarke*, 2 Met. 587.

*"Or by other sufficient defence."* The amount of the judgment is *primâ facie* evidence of the measure of damages, but this may be controlled by evidence showing the entire inability of the debtor to pay, and that the actual injury is therefore less than the amount of the judgment against him. See *West v. Rice*, 9 Met. 564.

If the plaintiff sues out an alias execution, and the original defendant is committed after judgment on the scire facias is rendered, but before it is satisfied, it seems that the plaintiff cannot proceed further against the bail. See *Warren v. Gilmore*, 11 Cush. 15, 17.

As to what is a sufficient defence, see further, *Champion v. Noyes*, 2 Mass. 481. — *Stevens v. Bigelow*, 12 Mass. 433. — *Warren v. Gilmore*, 11 Cush. 15.

SECT. 8. "*Writ of scire facias.*" An action of contract will not lie upon a bail bond. *Crane v. Keating*, 13 Met. 339.

A bail bond, in which the obligors acknowledged themselves bound to the sheriff by his proper name, was held to support a writ of scire facias, although by a clerical error the bond was made payable to a former sheriff. *Glezen v. Rood*, 2 Met. 490.

"*Sufficient to allege substantially,*" &c. The writ need not allege that the bail bond was executed by the principal. *Bull v. Clarke*, 2 Met. 587. See also St. 1869, c. 436.

SECT. 10. "*Unless the writ of scire facias is served on him within one year.*" The time is limited to one year notwithstanding the defendant has been absent from the commonwealth during the whole time. *Gass v. Bean*, 5 Gray, 397.

Error lies to reverse a judgment in scire facias when the action is shown by the record to have been commenced after the expiration of the year. *Gass v. Bean*, 5 Gray 397.

*Surrender of Principal, &c.*

SECT. 17. This section is merely directory, and the legality of the surrender will not be affected by a failure to comply with its provisions. *Jones v. Farney*, 8 Cush. 137, 138.

SECT. 18. "*Notice in writing.*" A notice in the following form: "You will please take notice that we, the undersigned, sureties for B., in the case of A. v. B., now pending in the superior court within and for the county of Suffolk, have this day surrendered him to the keeper of the jail at said jail in said county of Suffolk, at 11.30 o'clock, A.M.," which was served on the plaintiff's attorney on the day of the surrender, was held sufficient, although it had no date. *Reed v. Maynard*, 11 Allen 394.

As to whether the provisions of this section are conditions precedent to the validity of the surrender, or only directory, see *Reed v. Maynard*, 11 Allen 394.

SECT. 19. As to whether a compliance with the provisions of this section is a condition precedent to the discharge of the bail, see *Warren v. Gilmore*, 11 Cush. 15, 16.

## CHAPTER CXXVI.

OF PROCEEDINGS AGAINST ABSENT DEFENDANTS AND UPON  
INSUFFICIENT SERVICE.

For an act concerning actions by or against persons in the military or naval service of the United States, see St. 1862, c. 188.

SECT. 1. A judgment in this state against two defendants, one of whom was an inhabitant of another state and was not served with process, whose property was not attached, and who did not authorize any appearance in his behalf, may be reversed as to him by a writ of error, although the record states that, at the time at which the action was entered, "the defendants came by their attorney." *Bodurtha v. Goodrich*, 3 Gray 508.

In the case of a bill in equity for specific performance, brought against a person who was out of the state and had never been an inhabitant, it was held that an attachment alone was not sufficient to give the court jurisdiction. See *Spurr v. Scoville*, 3 Cush. 578.

SECT. 3. "*May be allowed to set-off.*" It lies in the discretion of the court whether such set-offs shall be allowed. *Goode-now v. Buttrick*, 7 Mass. 140. — *Hathaway v. Russell*, 16 Mass. 473, 478. — *Warren v. Wells*, 1 Met. 80. — Commissioners' Report on the Revised Statutes, note to chap. 90, sect. 45.

SECT. 6. "*Absent from the state.*" It makes no difference whether the absent defendant was ever an inhabitant of the state or not. *Thayer v. Tyler*, 10 Gray 164, 168.

"*Upon suggestion thereof by the plaintiff.*" If the plaintiff does not make the suggestion, and obtains judgment without a continuance as provided in this section, the judgment may be reversed or avoided. *Blanchard v. Wild*, 1 Mass. 342, 346. If all the requisitions of the statutes in regard to notice were complied with, but the defendant, nevertheless, did not receive actual notice, his remedy is by writ of review. If the statute

requirements were not complied with, his remedy is by writ of error. *Smith v. Paige*, 4 Allen 94. — Gen. St. c. 146, s. 20. — *Packard v. Matthews*, 9 Gray 311. If a judgment recovered without sufficient notice is prejudicial to a third party who is not privy to it, such third party may avoid it in a collateral proceeding by plea and proof. *Downs v. Fuller*, 2 Met. 135. — *Leonard v. Bryant*, 11 Met. 370, 373. — s. c. 2 Cush. 32. — *Clark v. Fowler*, 5 Allen 45. — *Richardson v. Smith*, 11 Allen 134, 136.

“*Continued from time to time until notice,*” &c. Continuance and further notice may be waived by the defendant. See *Morrison v. Underwood*, 5 Cush. 52. — *Clark v. Fowler*, 5 Allen 45. — *Richardson v. Smith*, 11 Allen 134, 138.

SECT. 8. “*Unless he first gives bond.*” The bond may be given by a person other than the plaintiff, provided &c. (St. 1868, c. 285). — St. 1869, c. 436.

The fact that execution is taken out without giving bond, will not support a writ of error. *Johnson v. Harvey*, 4 Mass. 483. For such omission the defendant may bring a writ of review within the year, or he may bring a writ of audita querela to vacate all proceedings under the execution. *Dingman v. Myers*, 13 Gray 1.

“*With condition to repay,*” &c. On the reversal, by a writ of review, of a judgment rendered on scire facias against bail, the bail may surrender their principal on payment of costs, as they might have done before the erroneous judgment was entered. *Thayer v. Goddard*, 19 Pick. 60, 65.

SECT. 15. “*If judgment is rendered.*” It makes no difference whether such judgment was rendered in this or in another state. *Shirley v. Shattuck*, 18 Met. 256.

## CHAPTER CXXVII.

OF ACTIONS WHICH SURVIVE, AND THE DEATH AND DISABILITIES  
OF PARTIES.*Actions which survive.*

SECT. 1. "*Or other damage to the person.*" These words extend only to damages of a physical character. *Smith v. Sherman*, 4 Cush. 408, 413. — *Nettleton v. Dinehart*, 5 Cush. 543. The question whether such an action may be maintained by an executor or administrator, depends on the fact whether the testator or intestate lives after the occurrence of the act which constitutes the cause of action, so that a right of action actually accrues to him; but it does not depend upon his consciousness, intelligence, or mental capacity of any kind, subsequent to such occurrence. *Bancroft v. Boston & Worcester Railroad Corporation*, 11 Allen 34. — *Kearney v. Boston & Worcester Railroad Corporation*, 9 Cush. 108. — *Hollenbeck v. Berkshire Railroad Company*, 9 Cush. 478.

"*For damage done to real or personal estate.*" The cause of action survives only when the injury is occasioned directly by the wrongful act of a party, and it does not survive where the injury results incidentally or collaterally therefrom, or from the doing of some other act, or from the happening of some subsequent event over which the wrong-doer had no control. *Cutting v. Tower*, 14 Gray 183.

An action for fraudulently recommending a trader as in good credit, whereby the plaintiff was induced to sell him goods on credit, and thereby sustained damage, does not survive. *Read v. Hatch*, 19 Pick. 47.

It seems that an action for the breach of a promise of marriage does not survive, if no special damage is alleged. *Smith v. Sherman*, 4 Cush. 408, 413. — *Stebbins v. Palmer*, 1 Pick. 71, 78.

It seems, also, that actions for malicious prosecution and for

libel do not survive. *Nettleton v. Dinehart*, 5 Cush. 543. — *Walters v. Nettleton*, 5 Cush. 544.

When an action, which did not survive, was delayed for the convenience of the court, and the defendant died in the meantime, the court ordered judgment to be entered as of a prior term. *Perry v. Wilson*, 7 Mass. 393.

For an act providing that certain suits in equity shall survive, see St. 1865, c. 42.

*Death of Parties in Personal Actions.*

SECT. 7. There is no statute of limitations which fixes the time within which the executor or administrator must be cited. *Bank of Brighton v. Russell*, 13 Allen 221.

SECT. 11. For the law prior to this statute, see *Sumner v. Tileston*, 4 Pick. 308. — *Boynnton v. Rees*, 9 Pick. 527.

SECT. 12. For the law prior to this statute, see *Boynnton v. Rees*, 9 Pick. 527, 532.

*Death of Parties in Real and Mixed Actions.*

SECT. 13. An action, commenced by one who has only a life-estate in the land in question, is abated by his death. *Brown v. Kendall*, 13 Gray 272. — *Ferrin v. Kenney*, 10 Met. 294.

Whether under this section a *grantee* of an heir or devisee of the plaintiff could be admitted to prosecute the action, *quære*. See *Sacket v. Wheaton*, 17 Pick. 103, 105. — *Drake v. Curtis*, 1 Cush. 395, 409. — *Brown v. Wells*, 12 Met. 501, 503.

For the law prior to the General Statutes, see *Brown v. Wells*, 12 Met. 501. — *Drake v. Curtis*, 1 Cush. 395.

SECT. 14. For the law prior to the statute, see *Oxnard v. Proprietors of the Kennebeck Purchase*, 10 Mass. 179. — *Cutts v. Haskins*, 11 Mass. 56.

SECT. 16. For the law prior to the statute, see *Thomas v. Smith*, 2 Mass. 479. — *Alley v. Hubbard*, 19 Pick. 243.

SECT. 17. For the law prior to the statute, see *Thomas v. Smith*, 2 Mass. 479. — *Holmes v. Holmes*, 2 Pick. 23.

*Death of Parties in Petition for Partition, &c.*

SECT. 18. For the law prior to the statute, see *Thomas v. Smith*, 2 Mass. 479. — *Mitchell v. Starbuck*, 10 Mass. 5.



*Marriage.*

SECT. 22. For the law prior to this statute, see *Newell v. Marcy*, 17 Mass. 342. — *Swan v. Wilkinson*, 14 Mass. 295.

*Insanity.*

SECT. 23. If the court is satisfied that either party is insane, it seems that it is bound, before further proceedings, to have a guardian appointed. *Denny v. Denny*, 8 Allen 311. — *Mitchell v. Kingman*, 5 Pick. 431. — *Mansfield v. Mansfield*, 13 Mass. 412.

The attention of the court may properly be directed to an inquiry upon the question of insanity, by a third party not connected with the suit as one of the immediate parties thereto. *Denny v. Denny*, 8 Allen 311, 313.

*Death or Removal of a Public Officer, &c.*

SECT. 24. "*Parish.*" See *Packard v. Nye*, 2 Met. 47, 52.

"*May be prosecuted by his successor.*" See *Cutts v. Parsons*, 2 Mass. 440. — *Holten v. Cook*, 12 Mass. 575. — *Stevens v. Hay*, 6 Cush. 229, 230.

It seems that the bonds, &c., on which the successors of the officers enumerated in this section may bring and prosecute actions must be, — as they undoubtedly must be in the case of treasurers, — bonds, &c., which are made to them in their official capacity, and which the law either requires or authorizes to be made to them in that capacity. *Stevens v. Hay*, 6 Cush. 229, 231.

## CHAPTER CXXVIII.

## OF ACTIONS BY AND AGAINST EXECUTORS AND ADMINISTRATORS.

SECT. 1. "*All actions,*" *f.c.* "Transitory actions by or against executors or administrators may be brought in any county in which such actions might have been brought by or against the testator or intestate at the time of his decease." St. 1865, c. 13.

SECT. 5. For the early law in regard to writs and executions against executors and administrators, see *Cooke v. Gibbs*, 3 Mass. 193, 197.

As to the form of writs to be used in actions embraced under this section, see notes on Gen. Sts. c. 123, s. 10.

SECT. 6. As to the law before the statute, see *Hardy v. Call*, 16 Mass. 530.

SECT. 11. "*Or is removed.*" The marriage of a feme sole executrix or administratrix, whereby her authority is extinguished, is a removal within the meaning of the statute. *Brown v. Pendergast*, 7 Allen 427. But see St. 1869, c. 409, s. 2.

As to the reason for this section, see *Brown v. Pendergast*, 7 Allen 427. — *Grout v. Chamberlin*, 4 Mass. 611, 613.

SECT. 14. As to the reason for this section, see *Brown v. Pendergast*, 7 Allen 427.

## CHAPTER CXXIX.

### OF PLEADINGS AND PRACTICE.

#### PLEADINGS.

##### *Forms at Law.*

SECT. 1. "*Actions of contract.*" A contract, in the broadest and most liberal signification of the word, is an agreement, obligation, or legal tie, whereby one party binds himself, or becomes bound expressly or impliedly to another, to do a certain act. *Van Kuran v. May*, 7 Allen 466, 468.

##### *Declarations, &c.*

SECT. 2. *Second Clause.* A declaration in tort for breaking and entering a close need not contain any averment of time. *Knapp v. Slocumb*, 9 Gray 73. For remarks bearing on this clause, see *Mulry v. Mohawk Valley Insurance Co.*, 5 Gray 541, 543.

*Third Clause.* The statement of a mere inference of law, as for instance that "the defendant owes the plaintiff the

amount of said note," will not avail to cure the want of a statement of a necessary substantive fact, as that "the note was assigned to the plaintiff." *Hollis v. Richardson*, 13 Gray 392, 394. — *Millard v. Baldwin*, 3 Gray 484. — *Read v. Smith*, 1 Allen 519, 521. — *Gray v. Cropper*, 1 Allen 337. — *Murdock v. Caldwell*, 10 Allen 299, 302.

As to when and how it is necessary to state the consideration of a contract, see *Stone v. White*, 8 Gray 589, 594. — *Murdock v. Caldwell*, 8 Allen 309. — *Cochran v. Duty*, 8 Allen 324.

The declaration in an action on a policy of insurance need not set out conditions subsequent. *Forbes v. American Mutual Life Insurance Company*, 15 Gray 249, 257.

It is not necessary that the declaration should allege or show that a note or contract declared on is duly stamped. *Trull v. Moulton*, 12 Allen 396.

As to what it is necessary to aver in a declaration on a recognition to prosecute an appeal, see *Tarbell v. Gray*, 4 Gray 444.

A promise, which the law implies, need not be alleged. *Frost v. Gage*, 1 Allen 262, 264. — *Hall v. Marston*, 17 Mass. 575.

In a declaration on a note payable at a particular place and time, it is not necessary to allege that a demand was made at that place and time. *Carley v. Vance*, 17 Mass. 889. — 3 Kent's Com. 97.

A declaration on an agreement which is within the statute of frauds, need not allege that the agreement is in writing. See *Price v. Weaver*, 13 Gray 272.

As to the proper form of a declaration on a written contract, which is within the statute of frauds, and which has been varied by a subsequent oral agreement, see *Whittier v. Dana*, 10 Allen 326.

In an action by the assignees of an insolvent debtor to recover the value of goods, the sale of which by the debtor was void under the insolvent laws, it was held that it was not necessary to set forth in detail in the declaration the facts on which the plaintiffs relied to support their case, but that a simple decla-

ration in the form used in an action of tort in the nature of trover would be sufficient. See *Tapley v. Forbes*, 2 Allen 20, 23.

A declaration averring "quantum valebant" is not good, if the fact is that the price is agreed upon. *Read v. Smith*, 1 Allen 519, 522.

A declaration alleging the sale of a certain number of "cords" of wood is not good, if the proof shows that the parties agreed to a measure of a cord different from the statute measure. *Cotton v. King*, 2 Allen 317.

A declaration by F. C. on an account stated, may be supported by evidence of an account rendered by the defendants to C. & Co., and evidence that F. C. did business under the name of C. & Co. *Charman v. Henshaw*, 15 Gray 293.

A declaration that certain property was paid for in money, is not supported by proof that it was paid for by an order on a third person, payable in specific articles, although such order was treated as money by the parties at the time of sale. *Stroud v. Pierce*, 6 Allen 413.

A declaration alleging a way to be appurtenant to a certain tract of land was held to be good, although the proof showed that the way was appurtenant only to a portion of such tract. *Pettingill v. Porter*, 3 Allen 349.

It is not necessary to set out in detail the elements of damages sought to be recovered, but under a general averment all such damages as naturally flow from the cause of action described in the declaration may be recovered. If, however, special or peculiar damages are claimed, they must be specifically averred. *Prentiss v. Barnes*, 6 Allen 410. Thus, in an action for money had and received, it was held that the plaintiff could not, without alleging a prior demand, recover interest prior to the date of the writ, since such interest could only be recovered as special damages. *Ordway v. Colcord*, 14 Allen 59.

*Fourth Clause.* "One count only need be inserted." This language leaves it to the option of the plaintiff to insert one or

more. *Lovett v. Salem & South Danvers R.R. Co.*, 9 Allen 557, 561.

*Fifth Clause.* “*Any number of counts \* \* \* belonging to the same division of actions.*” For a case in which a count praying for relief in equity was joined with a count at law, and in which it was held that the action could not be maintained, see *Harvey v. De Witt*, 13 Gray 536.

“*But when it is deemed doubtful,*” &c. When a count in contract and a count in tort are joined, it lies in the discretion of the court whether the plaintiff shall be obliged to elect upon which count he will proceed. A refusal to order the election is not open to exception. *Carlton v. Pierce*, 1 Allen 26, 28. — *Sullivan v. Fitzgerald*, 12 Allen 482. See also *Cunningham v. Hall*, 7 Gray 559, 562.

As to what the action should be called when counts in contract and tort are joined, see *Hulett v. Pixley*, 97 Mass. 29.

*Sixth Clause.* “*The common counts shall not be used unitedly.*” The *common counts* are “counts of invariable form, framed upon certain general principles of statement, and therefore common in their application to a great variety of actions, as distinguished from *special counts*, which are adapted to the special circumstances of each particular case.” *Burrell's Law Dictionary*, “Common Counts.” See also 1 Chitty on Pleading, 297. — *Stephens on Pleading*, 8th Am. Ed., Second Appendix, Note 4. — *Bouvier's Law Dictionary*, “Common Counts.” — *Stearns v. Washburn*, 7 Gray 187. It seems that the twelve short counts at the beginning of the “Schedule of Forms,” appended to this chapter, are common counts within the meaning of this clause.

The intention of this provision of the statute is to prohibit the method, formerly practised, of adding to a special count upon a contract, express or implied, one or more general or common counts, in order to save the verdict in case the evidence should vary from the allegations of the special count. The writs of the United States circuit court for this district still

contain the common counts, printed unitedly, in the manner formerly in use in our state courts. See also *Willard v. Williams*, 7 Gray 184, 185.

*Seventh Clause.* "*Either of which.*" It seems that the words "either of" are equivalent to the words "one at least." *Stearns v. Washburn*, 7 Gray 187, 188.

"*Correctly described by any one of the common counts.*" See *Morse v. Potter*, 4 Gray 292. — *Stearns v. Washburn*, 7 Gray 188. — *Richardson v. Crooker*, 7 Gray 190. — *Cardell v. Bridge*, 9 Allen 355. — *Johnson v. Trinity Church Society*, 11 Allen 123, 126. See notes on the forms appended to this chapter.

*Eighth Clause.* The change of form herein provided for does not change the common law rules in regard to evidence. Thus, in an action of tort for the conversion of goods, the evidence must be such as would support trover at common law. *Robinson v. Austen*, 2 Gray 564. See also Gen. St. c. 129, s. 81.

*Ninth Clause.* "*All written instruments.*" This applies only to such instruments as are relied on as the ground of action. *Bernard v. Cafferty*, 11 Gray 10. See also *Dillon v. Brown* 11 Gray 179. A written promise to pay a certain sum to "A. or B.," and also an instrument in writing, in the following form: "Due A. B., on account, \$50, — C. D.," have both been held to be within the meaning of this section. *Osgood v. Pearsons*, 4 Gray 455. — *Lincoln v. Butler*, 14 Gray 129.

A copy of a stamp affixed to the instrument need not be added to the copy of the instrument. *Trull v. Moulton*, 12 Allen 396.

"*If the instrument relied on is lost or destroyed.*" See *Boston Lead Company v. McGuirk*, 15 Gray 87.

*Tenth Clause.* See *Warner v. Brooks*, 14 Gray 109, 111.

SECT. 4. "*Persons severally liable,*" &c. It seems that the only cases in which this statute allows the joinder in one action of parties to *different* contracts are those in which such contracts all arise out of one written instrument, as in the case of a bill of exchange or promissory note. *Wallis v. Carpenter*, 13 Allen 19, 24. — *Leonard v. Robbins*, 13 Allen 217, 220.

This section has been held to apply to persons who were liable jointly and severally. *Hawkes v. Phillips*, 7 Gray 284, 287.

SECT. 6. When the place of the alleged trespass was designated simply as the "dwelling-house" of the plaintiff "in his occupation," it was held that the description was sufficient. *Sawyer v. Ryan*, 13 Met. 144, 148. See also *Forbush v. Lombard*, 13 Met. 109.

As to the object and effect of this section, see *Hall v. Mayo*, 97 Mass. 416, 419.

SECT. 7. This section applies to civil actions in the municipal court of the city of Boston. St. 1867, c. 355, s. 2. For provisions, similar to those of this and the two following sections, in regard to writs returnable before justices of the peace and police courts, see St. 1862, c. 20.

SECT. 8. "*The declaration may be filed,*" &c. This section applies to civil actions in the municipal court of the city of Boston. St. 1867, c. 355, s. 2. See also notes on Gen. St. 129, s. 7.

If the declaration is inserted in the writ, neither a new declaration nor an addition to the old one can afterwards be filed except by leave of court or by consent of the defendant. *Clark v. Ward*, 7 Gray, 409. — *Jones v. Hsley*, 1 Allen 273.

SECT. 9. This section applies to civil actions in the municipal court of the city of Boston. St. 1867, c. 355, s. 2. See also notes on Gen. St. c. 129, s. 7.

"*It shall be a discontinuance.*" A defendant, who has answered to the merits, cannot afterwards object that no declaration was inserted in the writ or filed in accordance with the requirements of the statutes, but must be deemed to have waived his right to treat the action as thereby discontinued. *Clark v. Montague*, 1 Gray 446.

"*Defendant or trustee may have judgment for costs.*" The complaint for costs must be made at the return term. *Lombard v. Oliver*, 5 Gray 9.

SECT. 10. "*Shall file a bill of particulars.*" The want of a

bill of particulars cannot be objected to after the trial has begun. *Preston v. Neale*, 12 Gray 222.

As to the bill of particulars under a count in insimul computassent, see *Rundlett v. Weeber*, 3 Gray 263, 266.

See *Jones v. Hsley*, 1 Allen 273.

*Demurrers.*

SECT. 11. This section applies to civil actions in the municipal court of the city of Boston. St. 1867, c. 355, s. 2.

*"Demurs to the declaration."* A demurrer to the whole of a declaration, which contains two counts, one of which is good, must be overruled. *Sears v. Trowbridge*, 15 Gray 184.

*"Or to some one or more counts therein."* If there are two counts, a demurrer to one does not render unnecessary an answer to the other. *Dwight v. Holbrook*, 1 Allen 560.

*"And shall assign specially the causes of demurrer."* A demurrer to a declaration will not be sustained for any cause which is not specially alleged. As to the object of requiring a specific statement of the causes of demurrer, see *Washington v. Eames*, 6 Allen 417, 419. See also *Proctor v. Stone*, 1 Allen 193, 196.

Objections, which might have been raised by demurrer, are sometimes equally efficient, although not raised until the trial. *Henry v. Moseley*, 7 Gray 479, 484. — *Hubbard v. Mosely*, 11 Gray 170, 172. — *Oliver v. Colonial Gold Co.*, 11 Allen 283. Certain objections, however, are valid only when raised by demurrer. *Upham v. Damon*, 12 Allen 98. — *Jewett v. Locke*, 6 Gray 233, 235. See also *Mullaly v. Austin*, 97 Mass. 30, 33. — *Shawmut Mutual Fire Insurance Co. v. Stevens*, 9 Allen 334. — *Batchelder v. Batchelder*, 2 Allen 105.

SECT. 12. This section applies to civil actions in the municipal court of the city of Boston. St. 1867, c. 355, s. 2.

Inconsistent defences in an answer furnish good grounds for a demurrer. *Jewett v. Locke*, 6 Gray 233.

It seems that it is a good cause for demurrer, if the plaintiff has joined two inconsistent counts, alleging that they are



for the same cause of action. *Mullaly v. Austin*, 97 Mass. 30, 33.

It is not a good ground for demurrer to a declaration, which sets forth an agreement and a breach thereof, that such declaration contains a claim for damages, a portion of which are too remote to be recovered. *Colburn v. Phillips*, 13 Gray 64.

For a case in which the defendant demurred to the declaration on the ground, among others, that it contained irrelevant, improper, and superfluous allegations, see "*Joannes*" *v. Burt*, 6 Allen 236, 239. See also *Shawmut Mutual Fire Insurance Co. v. Stevens*, 9 Allen 334.

*First Clause.* It seems that a defect of the kind mentioned in this clause can be taken advantage of only by demurrer. *Barlow v. Leavitt*, 12 Cush. 483, 484. See Gen. St. c. 129, s. 79.

*Second Clause.* For a case in which a declaration on a recognizance to prosecute an appeal was held not to state a legal cause of action, see *Tarbell v. Gray*, 4 Gray 444.

Where a declaration for slander failed strictly to comply with the direction subjoined to the form of a declaration for slander at the end of this chapter, it was held that the objection could be availed of only by demurrer. *Clay v. Brigham*, 8 Gray 161.

A declaration on a written promise, which neither sets forth a copy nor the legal effect of the writing, is subject to demurrer. *Shawmut Mutual Fire Insurance Co. v. Stevens*, 9 Allen 332.

*Third Clause.* A demurrer may be made to a part of an answer. *Parkhurst v. Ketchum*, 6 Allen 406.

"*Shall be specially pointed out.*" Under this provision the party who demurs is confined to the causes of demurrer specified, although the declaration or answer is defective on other grounds. *Washington v. Eames*, 6 Allen 417. — *Suffolk Bank v. Lowell Bank*, 8 Allen 356. Where a demurrer to an answer assigns as the only cause of demurrer, that the answer "does not state a legal defence to the declaration," such demurrer operates as a waiver of all formal defects. *Proctor v. Stone*, 1 Allen 193, 196. As to the necessity of specially pointing out

the particulars in which the alleged defect consists, see further, *Suffolk Bank v. Lowell Bank*, 8 Allen 355.

*Answers, Replications, &c.*

Answers in the municipal court of Boston are to be filed only when required by the rules or orders of said court. St. 1867, c. 355, s. 2.

SECT. 13. "Matter in abatement cannot be pleaded in the same plea or answer with matter in bar of all right of action." Per GRAY J. in *Morton v. Sweetser*, 12 Allen 134, 137.

Coverture is no defence in bar, but must be pleaded as matter of abatement. *Hayden v. Attleborough*, 7 Gray 338.

An answer or plea in abatement or motion to dismiss, except for want of jurisdiction, must be filed within the time for filing an affidavit of merits, and a subsequent affidavit or answer on the merits will not waive such answer, plea, or motion. *Cole v. Ackerman*, 7 Gray 38. — *Whipple v. Rogerson*, 12 Gray 347, 348. — *Walpole v. Gray*, 11 Allen 149. — *Seagrave v. Erickson*, 11 Cush. 89. — *Pratt v. Sanger*, 4 Gray 84, 88. — *Clark v. Connecticut River R.R. Co.*, 6 Gray 363. But in certain cases where matter in abatement arises after the commencement of the action, it may be pleaded at a later stage in the proceedings. *Rathbone v. Rathbone*, 4 Pick. 89, 92. — *Robbins v. Hill*, 12 Pick. 569. — *Bliss v. Bliss*, 12 Met. 266.

After the time for filing pleas in abatement, as above set forth, has expired, it is not within the power of the court in its judicial discretion to allow the filing of such a plea. *Hastings v. Bolton*, 1 Allen 529.

A plea in abatement is not waived by filing an affidavit of merits simultaneously with it. *Claffin v. Thayer*, 13 Gray 459.

In certain cases the defendant can plead a matter by answer in abatement, or by answer in bar, at his election. In a case where an action was commenced before a right of action existed, it was held that this fact might be pleaded in either way, and that if the defendant elected to plead it in bar, he was

entitled to all the benefit of such plea in the same manner as if a plea in bar only were admissible. *Benthall v. Hildreth*, 2 Gray 288. See also *Greenwood v. Lake Shore R.R. Co.*, 10 Gray 373, 374.

SECT. 14. This section applies to civil actions in the municipal court of the city of Boston. See St. 1867, c. 355, s. 2.

SECT. 15. This section applies to civil actions in the municipal court of the city of Boston, but answers are to be filed only when required by the rules and orders of said court. St. 1867, c. 355, s. 2.

*"In real and mixed actions."* As to the effect of pleading the general issue prior to the General Statutes, see *Johnson v. Boardman*, 6 Allen 28. — *Johnson v. Rayner*, 6 Gray 107. — *Richards v. Randall*, 4 Gray 53. — *Wheelwright v. Freeman*, 12 Met. 154. — *Sprague v. Waite*, 19 Pick. 455.

SECT. 16. This section applies to civil actions in the municipal court of the city of Boston. St. 1867, c. 355, s. 2.

*"Different consistent defences."* In an answer to an action of slander, a denial of having spoken the words charged, and an averment of their truth, are consistent defences. *Payson v. Macomber*, 3 Allen 69, 73.

An answer relying on a delivery of certain goods to the defendant, both by way of payment and in set-off, does not set up inconsistent defences, and the defendant need not elect at the trial whether he will introduce his evidence as proof of the one or the other. *Wheaton v. Nelson*, 11 Gray 15.

SECT. 17. This section applies to civil actions in the municipal court of the city of Boston. St. 1867, c. 355, s. 2.

This section applies only to actions properly included in the first section of this chapter. For a case which was held not to be governed by its provisions, see *Taylor v. New England Mining Co.*, 4 Allen 577.

*"The answer shall deny in clear and precise terms \* \* \* every substantive fact intended to be denied," &c.* A general denial "of each and every allegation" is sufficient under the

statute, but perhaps not advisable. Such a general denial is sufficient to put in issue every fact, the burden of proof of which rests on the plaintiff, whether such fact is alleged in the declaration or not. *Davis v. Travis*, 98 Mass. 222. — *Boston Relief and Submarine Co. v. Burnett*, 1 Allen 410. — *Estabrook v. Boyle*, 1 Allen 412. — *Snow v. Chatfield*, 11 Gray 12.

Where a declaration by a mutual fire insurance company averred that the directors "made an assessment, agreeably to their act of incorporation and by-laws," it was held that the defendant could deny the validity of the assessment, under an answer denying that any such assessment had been made as set forth in the plaintiff's declaration. *People's Equitable Mutual Fire Insurance Co. v. Arthur*, 7 Gray 267.

Under an answer denying the making of a promissory note, an alteration since it was signed may be proved. *Lincoln v. Lincoln*, 12 Gray 45.

In an action of replevin, an answer which avers that the defendant was and is the owner of the property replevied, and which denies the plaintiff's right to maintain the action, puts in issue the plaintiff's title to the property. *Chase v. Allen*, 5 Allen 599.

So an answer in an action of tort in the nature of trespass *quare clausum*, by denying that the defendant entered the plaintiff's close, as described in the plaintiff's writ, puts the plaintiff's title in issue. *Bennett v. Clemence*, 6 Allen 10.

In an action of tort for breaking and entering a close and removing a fence, the defendant, under an answer which only denies the breaking and entering, cannot disprove the removal of the fence, as this was a substantive fact stated in the declaration in aggravation of the principal injury, and therefore, if not denied, to be considered as admitted. *Knapp v. Slocumb*, 9 Gray 73.

Where a declaration averred that the defendant made a promissory note payable to the plaintiff, and that the defendant owed the plaintiff the amount of the said note, &c., it was held that the

signature could not be put in issue under an answer in which the defendant declared that, to the best of his knowledge and belief, he did not owe the plaintiff in the manner and form alleged, but left him to prove the same. *Framingham Bank v. Gay*, 9 Gray 241.

In an action on a note against partners it was held that an answer simply denying the making of the note admitted the partnership. *Geddes v. Adams*, 11 Gray 384.

If the plaintiff in his declaration makes any allegations which are not necessary to the maintenance of his action, the defendant will not be deemed to have admitted them by neglecting to deny them. *Woodbury v. Jones*, 3 Gray 261. — *Willard v. Williams*, 7 Gray 184.

Neither need the defendant deny in his answer, or make any averment regarding any fact necessary to the maintenance of the plaintiff's action, but not alleged in his declaration. *Jones v. Andover*, 10 Allen 18, 22. — *Tarbell v. Gray*, 4 Gray 441. See also *Allen v. Pearson*, 3 Gray 342, 344. See also *Boston Relief and Submarine Co. v. Burnett*, 1 Allen 410. — *Estabrook v. Boyle*, 1 Allen 412. — *Davis v. Travis*, 98 Mass. 222.

For other cases on the forms and effects of denials made by defendants in their answers, see *Granger v. Ilsley*, 2 Gray 521. — *Williams v. Cheney*, 3 Gray 215, 220. — *Alden v. Pearson*, 3 Gray 342, 344. — *Mulry v. Mohawk Valley Insurance Co.*, 5 Gray 541, 543. — *Eastern R.R. Co. v. Benedict*, 10 Gray 212, 214.

*"Or shall declare the defendant's ignorance of the fact," &c.* A defendant who answers in this form may nevertheless, on the trial, introduce evidence to rebut the plaintiff's proof. *Knapp v. Slocumb*, 9 Gray 73.

SECT. 18. This section applies to civil actions in the municipal court of the city of Boston. St. 1867, c. 355, s. 2.

*"He shall state all the substantive grounds," &c.* In an action upon an account annexed, it was held that the illegality of the contract could not be given in evidence by the defendant,

under an answer simply denying the sale and delivery of the articles mentioned in the account. *Granger v. Ilsley*, 2 Gray 521.

In an action for services rendered, when the answer simply denied that the defendant owed the amount claimed or any sum whatever, it was held that it was not necessary for the plaintiff to prove that the services were actually rendered, or that they were of the value alleged. *Van Buren v. Swan*, 4 Allen 380.

Where an answer to a count for use and occupation, simply denied all the allegations of the declaration, it was held that the defendant might prove that he held under a written lease, because an action for use and occupation could only be supported by proof of a tenancy under a parol demise. See *Warren v. Ferdinand*, 9 Allen 357. — *Knapp v. Slocomb*, 9 Gray 73. — *Very v. Small*, 16 Gray.

SECT. 19. This section applies to civil actions in the municipal court of the city of Boston. St. 1867, c. 355, s. 2.

See *Mulry v. Mohawk Valley Insurance Co*, 5 Gray 541.

SECT. 20. This section applies to civil actions in the municipal court of the city of Boston. St. 1867, c. 355, s. 2.

*"The answer shall set forth in clear and precise terms each substantive fact intended to be relied upon in avoidance of the action."* When the answer in an action on a promissory note, given in the name of a firm by a surviving partner, averred that the firm had expired and was dissolved before the note was given, it was held that it might be proved that the partnership had been dissolved by the death of one of its members. *Marlett v. Jackman*, 3 Allen 287, 297.

An answer alleging that certain goods replevied were the property of the defendant, and not of the plaintiff, was held to be sustained by proof that such goods had been mortgaged by the plaintiff to the defendant, and the possession of them surrendered to the latter. *Whitcher v. Shattuck*, 3 Allen 319, 320.

In an action on a promissory note, an answer which alleges that the defendant has received his discharge in insolvency from all debts due from him, and which refers to an annexed copy of the discharge, is not bad on demurrer, although such a discharge does not include all classes of debts, if, taking the answer and discharge in connection with the declaration, it appears that the note belongs to a class included in the discharge. *Whitney v. Rhoades*, 3 Allen 471.

Under an answer alleging that a note was given for an illegal consideration, it is sufficient to prove that it was given in renewal of a note so given. *Chenery v. Barker*, 12 Gray 345. See also *Gwynn v. Globe Locomotive Works*, 5 Allen 317.

The *illegality of a contract* cannot be set up in defence, unless such illegality is specially alleged in the answer, or appears from the declaration. *Goss v. Austen*, 11 Allen 525. *Bradford v. Tinkham*, 6 Gray 494. — *Granger v. Ilsley*, 2 Gray 521.

Neither can the *statute of frauds* be relied upon in defence, unless set up in the answer. *Middlesex Company v. Osgood*, 4 Gray 447, 448. — *Libby v. Downey*, 5 Allen 299.

If the defence to a general count for work and labor done is that the work was done under a special contract on which nothing was due at the time of bringing the suit, the answer must so allege. *Reed v. Scituate*, 7 Allen 141, 143.

In an action brought by the assignee of an insolvent debtor, it was held that the fact that the claim declared on had been sold by the assignee was a substantive fact which must be set out in the answer. *Cushman v. Davis*, 3 Allen 99.

In a case in which the answer in an action on a promissory note simply set up the statute of limitations, it was held that the defendant could not, in order to corroborate his testimony that no payments had been made upon it within the six years, prove that the note was without consideration. *Davidson v. Delano*, 11 Allen 523.

In an action of tort in the nature of trespass *quare clausum fregit*, brought by one holding as tenant at will, if the defendant

would justify his acts as authorized by a third person, who has received a written lease from the owner of the fee, he must allege these facts specially in his answer, and will not be allowed to show them under a mere general denial of the plaintiff's allegations. *Ward v. Bartlett*, 12 Allen 419.

In an action on a policy of insurance, it was held that misrepresentations of the assured, which were not set out in the answer, could not be relied upon to show that the policy was void, although the fact of such misrepresentations was first disclosed by the plaintiff's evidence. *Mulry v. Mohawk Valley Insurance Co.*, 5 Gray 541. — *Goodwin v. Daniels*, 7 Allen 61, 64.

It seems that the non-joinder or misjoinder of plaintiffs cannot be taken advantage of, unless pleaded in abatement or specified in the answer. *Bullock v. Hayward*, 10 Allen 460, 461.

Under an answer denying "each and every allegation" of a declaration which alleged that the defendant wrongfully, wilfully, and without right, dug a ditch in the highway, it was held that the defendant could not justify by showing that he acted under the authority of a surveyor of highways. *Snow v. Chatfield*, 11 Gray 12. But when the answer in an action of tort for breaking and entering a shop, denied the plaintiff's allegations, and averred that the defendant had the right to the possession, use, and occupation of the shop, and quietly and peaceably took possession, it was given as the opinion of the court that the defendant might justify by giving in evidence a lease of the premises, although such lease was not referred to in the answer. *Dillon v. Brown*, 11 Gray 179, 181. So in an action by the assignees of an insolvent debtor to recover the value of property sold by the debtor for the purpose of giving a preference, the defendant, under an answer denying the conversion of property of the plaintiff's, may prove that the assignees have affirmed the sale, such proof being only particular evidence of the fact set up in the answer. *Snow v. Lang*, 2 Allen 18.



Where a declaration in an action of slander averred that certain words were spoken maliciously, it was held that a general denial in the answer was not sufficient, if the real defence was that the circumstances, &c., afforded justification, — the allegation of malice not being an allegation of a substantive fact, but only of an inference of law from the fact that the words were spoken. *Goodwin v. Daniels*, 7 Allen 61, 63.

After a verdict and judgment for the penal sum in an action on a bond, the defendant, on a hearing to ascertain the amount due and payable in equity and good conscience pursuant to the provisions of the statutes (Gen. St. c. 133, ss. 9, 10), may prove any payments on the bond, although such payments are not set up in the answer. *Merrill v. McIntire*, 13 Gray 157, 167.

It seems that the coverture of the plaintiff and her consequent inability to sue is a matter which must be pleaded in abatement. *Hayden v. Attleborough*, 7 Gray 338, 343.

Where a judge at a trial before the superior court erroneously ruled that certain facts given in evidence by the defendant did not constitute a valid defence, it was held that the plaintiff could not, on the hearing of the defendant's exceptions to this ruling, for the first time object that this defence was not open to the defendant under his answer. *Burnett v. Smith*, 4 Gray 50. See also *Jones v. Session*, 6 Gray 288. — *Bullock v. Hayward*, 10 Allen 460, 462. For a case in which the plaintiff's counsel in his closing argument to the jury for the first time raised an objection to certain evidence on the ground that it was not admissible under the answer, see *Horne v. Bodwell*, 5 Gray 457.

SECT. 23. This section applies to civil actions in the municipal court of the city of Boston. St. 1867, c. 355, s. 2.

*"At any time before trial file a replication to the answer."* The plaintiff may, after one trial at which the jury have disagreed, file a replication at any time before another trial. *Burke v. Miller*, 4 Gray 117.

When the plaintiff in an action on a policy of insurance

voluntarily files a replication, which simply alleges that the defendants have waived the defence set forth in their answer, he thereby admits the truth of the facts stated in the answer. *Murphy v. People's Equitable Mutual Fire Insurance Co.*, 7 Allen 239.

“*Stating any facts in reply to the new matter.*” Where the answer to a declaration upon a promissory note sets up in defence a want of consideration and the statute of limitations, a replication, which simply traverses the latter defence, will not be construed as admitting that the note was without consideration, since the allegation of want of consideration was not new matter within the meaning of the statute. *Ballou v. Wells*, 12 Allen 485.

SECT. 24. This section applies to civil actions in the municipal court of the city of Boston. St. 1867, c. 355, s. 2.

“*That the plaintiff demurs to the answer,*” &c. It seems that inconsistency in the defences set up in the answer can be taken advantage of only by demurrer. *Jewett v. Locke*, 6 Gray 233.

“*Either party may demur to the allegation of the other party.*” This clause gives “a right to demur to a particular and distinct allegation as well as to the whole answer, or to a distinct allegation in a count as well as to a whole count; and this makes the right to demur under our statute co-extensive with the right to demur under the system of special pleading.” It is no objection to a demurrer to a part of an answer that no replication is made to the other parts of the answer, if no replication has been ordered by the court. *Montague v. Boston & Fairhaven Iron Works*, 97 Mass. 502, 503.

SECT. 25. This section applies to civil actions in the municipal court of the city of Boston. St. 1867, c. 355, s. 2.

“*A supplemental declaration, answer,*” &c. The defendant cannot, without leave of court, file a second answer, though within the required time. See *Hulbert v. Comstock*, 11 Gray 14.

SECT. 26. This section applies to civil actions in the municipal court of the city of Boston. St. 1867, c. 355, s. 2.

SECT. 27. This section applies to civil actions in the municipal court of the city of Boston, but answers are to be filed only when required by the rules and orders of said court. St. 1867, c. 355, s. 2.

*“Any substantive fact alleged with substantial precision and certainty, and not denied in clear and precise terms \* \* \* shall be deemed to be admitted.”* If the declaration contains any allegation of a fact which is not necessary to constitute the cause of action, such fact will not be deemed to be admitted, because not denied. *Willard v. Williams*, 7 Gray 184. — *Woodbury v. Jones*, 3 Gray 261. Nor, if the declaration omits to allege all the necessary substantive facts, will such facts be considered admitted because not denied. *Tarbell v. Gray*, 4 Gray 444, 446.

If the declaration on a promissory note alleges that it is destroyed, such allegation will be deemed to be admitted unless it is denied in the answer. *Boston Lead Co. v. McGuirk*, 15 Gray 87. Further, as to what are substantive facts, see notes on section 2, third clause.

In an action of contract on a promissory note, the declaration alleged “that the defendant made a promissory note, a copy of which with the indorsements thereon is hereto annexed, and the defendant owes the plaintiff the balance of said note and interest thereon.” The copy annexed was of a note dated more than six years before the commencement of the action, and having indorsed on it acknowledgments of part payments made within six years. The only ground of defence was that the action, at the time it was commenced, was barred by the statute of limitations, and it was held that the fact of part payment within six years before the commencement of the action was not alleged with such substantial precision and certainty as to be deemed admitted by the defendant, because not denied in his answer. *Brown v. Wakefield*, 1 Gray 450.

So also in an action to recover damages of a town for a defect in a highway, where the declaration alleged the defendants' failure to keep such highway in repair "at a place near the house of K.," whereby the plaintiff walking at that place was injured, it was held that the place where the accident occurred was not described with such certainty that the defendants by not denying their liability to keep the highway in repair at that spot, could be deemed to have admitted it. *Kellogg v. Northampton*, 4 Gray 65.

Where the answer in an action on an account annexed simply denied that the defendant owed the amount claimed or any amount whatever, it was held that the substantive facts alleged in the declaration were not denied in clear and precise terms, and that they must therefore be considered to be admitted. *Van Buren v. Swan*, 4 Allen 380. As to what will constitute a sufficiently clear and precise denial within the meaning of the statute, see also *People's Equitable Mutual Fire Insurance Co. v. Arthur*, 7 Gray 267. — *Alden v. Pearson*, 3 Gray 342.

SECT. 28. This section applies to civil actions in the municipal courts of the city of Boston. St. 1867, c. 355, s. 2.

#### PRACTICE.

##### *Indorsement of Process after Entry.*

SECT. 33. It seems that an indorser cannot be discharged and another substituted in his place without the consent of the defendant. *Caldwell v. Lovett*, 13 Mass. 422. — *Ely v. Forward*, 7 Mass. 25.

##### *Abatement.*

As to the time for filing pleas or answers in abatement, see notes to section 13 of this chapter.

SECT. 34. "*Other proceeding.*" The word "proceeding" includes verdicts. *Chaffee v. Pease*, 10 Allen 537, 538.

"*When the person and case may be rightly understood by the court, nor through defect or want of form only.*" As to when errors in the names or titles of the parties are fatal, see *Wight v. Hale*,

2 Cush. 486, 493. — Elder and Deacons of First Freewill Baptist Church in Lowell *v.* Bancroft, 4 Cush. 281, 284. — Kendall *v.* Carland, 5 Cush. 74, 78. — Langmaid *v.* Puffer, 7 Gray 378.

Where a writ was by mistake made returnable at Salem, instead of Ipswich, and before the last day of service the plaintiff caused the defendant to be notified of the mistake and to be served with a new and correct summons, and the action was regularly entered, it was held that the writ might be amended. *Kimball v. Wilkins*, 2 Cush. 555.

See also *Hodges v. Hodges*, 5 Met. 211.

SECT. 36. "*Or of summons.*" Under an order of court allowing a plaintiff to take out a new writ of *summons* to a new defendant, the plaintiff may take out a writ of *summons and attachment*, and cause the new defendant's goods to be attached thereon. *Whitcher v. Josslyn*, 6 Allen 350.

SECT. 39. This section applies to civil actions in the municipal court of the city of Boston. St. 1867, c. 355, s. 8.

As to the "law in case of a plea in abatement," see *Boston Glass Manufactory v. Langdon*, 24 Pick. 49, 51. — *Ocean Insurance Co. v. Portsmouth Marine Railway Co.* 3 Met. 420.

#### *Amendments.*

The supreme judicial court or the superior court may authorize amendments changing a suit at law into a proceeding in equity, or a proceeding in equity into a suit at law. St. 1865, c. 179.

SECT. 40. This section applies to civil actions in the municipal court of the city of Boston. St. 1867, c. 355, s. 2.

SECT. 41. As to the object of this section and the extent of its application, see *Hayward v. Hapgood*, 4 Gray 437, 438. — *Darling v. Roarty*, 5 Gray 71. — *Mann v. Brewer*, 7 Allen 202. It applies to proceedings before a justice of the peace. *McGuire v. Davis*, 8 Cush. 356.

"*In a civil suit.*" It has been held that these words include "bills in equity" (*Merchants' Bank of Newburyport v. Ste-*

venson, 7 Allen 489), writs of review (*Davenport v. Holland*, 2 Cush. 1, 13), and complaints under the bastardy act. *Bailey v. Chesley*, 10 Cush. 284. See also *Tourtelot v. Tourtelot*, 4 Mass. 506. — *New Marlborough v. Berkshire*, 9 Met. 423.

*"Amendments may be allowed."* The question, whether an amendment is to be allowed or not, is a matter within the discretion of the court, and consequently the decision of the court thereon is not subject to exception. *Richmond Iron Works v. Woodruff*, 8 Gray 447, 451. — *Payson v. Macomber*, 3 Allen 69, 71. — *Mann v. Brewer*, 7 Allen 202, 203. But see *Davenport v. Holland*, 2 Cush. 1, 11.

*"Introducing any party," &c.* *Tucker v. White*, 5 Allen 322. — *Fitch v. Stevens*, 2 Met. 505.

*"Changing the form of the action."* See *Mann v. Brewer*, 7 Allen 203. — *Brown v. Howe*, 3 Allen 528. — *Stone v. Chamberlain*, 7 Gray 206. — *Fay v. Taft*, 12 Cush. 448. See also *Wiley v. Yale*, 1 Met. 553.

*"Other matter, either of form or substance."* The name of the defendant in a writ may in certain cases be amended. *Wight v. Hale*, 2 Cush. 486. — *Langmaid v. Puffer*, 7 Gray 378. See also notes on section 34. A writ against one person may be amended, by leave of court, so as to charge him in his capacity as administrator. *Lester v. Lester*, 8 Gray 437.

A writ, directing the officer "to attach the goods and estate of [blank] to the value of twenty dollars, and for want thereof to take the body of the said C. D.," may be amended by inserting the defendant's name in the blank space. *McGuire v. Davis*, 8 Cush. 356.

For a case in which a writ made returnable at Salem, instead of at Ipswich, was allowed to be amended, see *Kimball v. Wilkins*, 2 Cush. 555. See also notes on section 34.

A writ of replevin was allowed to be amended, by adding to the description of the property sued for, the words, "of the value of twenty-five dollars," since the only effect of such an amendment was to make it apparent on the face of the writ

that the case was within the jurisdiction of the court. *Jaques v. Sanderson*, 8 Cush. 271.

Upon a motion to dismiss an action of replevin, because the replevin bond was less than double the appraised value of the goods as stated in the officer's return and the appraiser's certificate upon the writ, it was held that the return and certificate might be amended by the officer and appraisers, upon proof, satisfactory to the court, that too large an amount had been stated in them by mistake; and the decision of the court upon the sufficiency of the proof was held to be conclusive. *Hammond v. Eaton*, 15 Gray 186.

A writ, in which the amount of the plaintiff's damages is wholly omitted, may be amended, by leave of court, by filling the blank with the proper sum. *Cragin v. Warfield*, 13 Met. 215. In a case which was referred to arbitrators, who reported a sum due which was greater than the ad damnum named in the writ, it was held that the amount of the ad damnum might be increased by amendment. *Ellis v. Ridgway*, 1 Allen 501. So a justice of the peace may, previous to the trial, allow an amendment of a writ, returnable before him, by reducing the ad damnum to a sum which will bring the case within his jurisdiction, provided that he has jurisdiction of the parties and the subject-matter. *Hart v. Waitt*, 3 Allen 532. See also *Ladd v. Kimball*, 12 Gray 139.

In the case of a writ made on the 26th April, 1853, but bearing date 26th May, 1853, returnable before a justice of the peace "on the 7th May next," and entered on the 7th May, 1853, it was held that it might, by leave of the justice, after the appearance of the defendant, be amended by substituting the true date. *McIniffe v. Wheelock*, 1 Gray 600. See also *Fay v. Hayden*, 7 Gray 41.

The test of a writ may, in any stage of a suit, be amended by substituting the proper name. *Nash v. Brophy*, 13 Met. 476, 478.

Even after verdict, a declaration may be amended on terms "in

order to make it agree with the proof, if such amendment simply enables the plaintiff to maintain his action for the cause for which it was intended to be brought. *Bannon v. Angier*, 2 Allen 128. — *Colton v. King*, 2 Allen 317. But where such amendment is allowed, the court will sometimes set aside the verdict, and order a new trial. *Shaw v. Boston & Worcester R.R. Co.*, 8 Gray 45, 77.

In an action on a contract, the consideration of which was alleged in the declaration to be a reasonable compensation, but was proved to be a definite sum ; inasmuch as it did not appear that the defendant had been prejudiced by the variance, the court allowed the plaintiff to amend his declaration after verdict, so as to agree with the evidence. *Cleaves v. Lord*, 3 Gray 66.

In a case where the declaration alleged two considerations for a contract, and a verdict was rendered on proof of one only, and exceptions were taken on that ground, the supreme court on the trial of the exceptions permitted the declaration to be amended by striking out the consideration not proved. *Stone v. White*, 8 Gray 589.

Where there are two distinct causes of action, and the jury return a verdict for the plaintiff on one, but do not agree as to the other, the plaintiff may be allowed to amend by striking out that portion of his declaration which embraces the claim upon which no verdict is returned, so that the jury may return their verdict generally for the plaintiff. *Hayward v. French*, 12 Gray 453, 460.

As to granting amendments in suits in equity, see *Merchants' Bank of Newburyport v. Stevenson*, 7 Allen 489, 491. See also *Bean v. Green*, 4 Cush. 279. — *Emery v. Osgood*, 1 Allen 244.

*"The cause for which it was intended to be brought."* Before the insertion of this clause in the statute the court did not go beyond the record in order to ascertain whether a proposed amendment was for an additional or different cause of action from that set out in the original declaration, but now by the



statute provision the *intention* of the party in bringing the suit is introduced as the important element by which the court is to be governed in the exercise of its power of allowing amendments. *Mann v. Brewer*, 7 Allen 202, 203. See also *Smith v. Palmer*, 6 Cush. 513.

Bail are not discharged by the allowance of an amendment to a declaration on the money counts, though such amendment adds counts upon promissory notes, which were in fact, though not so appearing on the record, the cause of action originally intended to be relied on. *Wood v. Denny*, 7 Gray 540, 541.

"*A legal defence.*" See *Hastings v. Bolton*, 1 Allen 529, 530.

For a case in which an amended answer was allowed to be filed at the trial, see *Howe v. Pierson*, 12 Gray 26.

As to the *terms* on which the court will allow amendments, see *Bannon v. Angier*, 2 Allen 128. — *Richardson v. Wolcott*, 10 Allen 489. — *Lester v. Lester*, 8 Gray 437. — *Stone v. White*, 8 Gray 589, 595. — *Cleaves v. Lord*, 3 Gray 66, 71.

SECT. 42. Where in an action for trespass on real estate the jury found for the plaintiff without assessing any damages, it was held that the court might amend the verdict and judgment by inserting nominal damages. *Chaffee v. Pease*, 10 Allen 537.

"*Defects or imperfections.*" As to certain defects and imperfections in an action on a recognizance, which the court held might be rectified and amended, see *Wingate v. Commonwealth*, 5 Cush. 446. See also *Kendall v. Carland*, 5 Cush. 74, 78. — *Walker v. Boston & Maine R.R.*, 3 Cush. 1, 11. — *Fitchburg R.R. Co. v. Boston & Maine R.R.*, 3 Cush. 58, 78.

#### *Defaults.*

SECT. 45. If the defendant files a plea in abatement or motion to dismiss, he will not be defaulted on account of the want of an affidavit of merits, but will be entitled to have the judgment of the superior court, or of a single justice of the

supreme court, if the action is brought in that court, upon the point raised by such plea or motion. *Cole v. Ackerman*, 7 Gray 38, 41. See however *Claffin v. Thayer*, 13 Gray 459, 460. — *Clark v. Connecticut River R.R. Co.*, 6 Gray 363. But it seems that the affidavit of merits may be of use in enabling the defendant to obtain the judgment of the supreme court on the question raised. *Clark v. Connecticut River R.R. Co.*, 6 Gray 363. — *Ames v. Winsor*, 19 Pick. 247, 249. See also Gen. St. 114, s. 10. — Gen. St. 115, s. 7.

#### *Interrogatories.*

The provisions of this chapter in regard to interrogatories are applicable to suits in equity. St. 1862, s. 40.

SECT. 46. "*Material to the support or defence of the suit.*" The right of either party to file interrogatories is confined to such matters as are material to the support of his own case, and does not extend to matters in support of the case of the adverse party. *Wilson v. Webber*, 2 Gray 558.

"*The adverse party.*" This includes those living out of the state. *Townsend v. Gibbs*, 11 Cush. 158.

Interrogatories may be addressed to one of several defendants in an action of contract, and the answers to such interrogatories will be admissible in evidence for the plaintiff. *Stetson v. Wolcott*, 15 Gray 545.

In the case of an action commenced before a justice of the peace, it was held that the fact that interrogatories were filed and then waived before such justice, did not affect the right to file interrogatories in the superior court on appeal. *Kennedy v. Gooding*, 7 Gray 417.

As to the object of this and the following sections, see *Wilson v. Webber*, 2 Gray 558.

SECT. 47. "*An affidavit.*" Such affidavit is not conclusive evidence that the interrogatories are material. *Foss v. Nutting*, 14 Gray 484.

SECT. 48. "*Within ten days.*" Sunday is not to be excluded

in the computation, unless, perhaps, where it is the last of the ten days. *Robbins v. Holman*, 11 Cush. 26.

“*Further time.*” See *Townsend v. Gibbs*, 11 Cush. 158.

Answers filed in accordance with the provisions of these sections are competent evidence against the party filing them in another suit, although the issues in the two suits are different. *Williams v. Chenery*, 3 Gray 215, 220.

SECT. 51. “*Answered separately.*” One answer may be made to several interrogatories, to each of which it is responsive. *Amherst & Belchertown R.R. Co. v. Watson*, 8 Gray 529.

“*Relevant to the issue.*” These words have reference to the issue in the cause, and not simply to the issue raised by the interrogatory. *Baxter v. Massasoit Insurance Co.*, 13 Allen 320, 325.

As to the object and effect of the last clause in this section, see *Williams v. Chenery*, 3 Gray 215, 220.

SECT. 52. “*Where any document, book,*” &c. One party cannot as of right, and without a specific order of court, require the other to produce all his books and papers. *Amherst & Belchertown R.R. Co. v. Watson*, 8 Gray 529.

SECT. 53. “*Which would tend to criminate himself.*” But to excuse the party from answering, he must answer under oath that it would tend so to criminate him. See *Hobbs v. Stone*, 5 Allen 109.

For remarks on this section, see *Wilson v. Webber*, 2 Gray 558, 560.

SECT. 56. A plaintiff cannot be non-suited for insufficiency of answers which substantially meet all the interrogatories of the adverse party, unless he has refused to comply with an order of the court pointing out the insufficiencies and directing further answers. *Amherst & Belchertown R.R. Co. v. Watson*, 8 Gray 529.

It is within the discretion of the presiding judge to refuse to grant a motion for a non-suit on account of the failure of the plaintiff to answer interrogatories. *Stern v. Filene*, 14 Allen 9.

Placing an action on the trial list is no waiver of the right to claim a default for failure to answer interrogatories. *Kennedy v. Gooding*, 7 Gray 417.

*Interlocutory Orders.*

SECT. 58. "*The court may.*" This is a matter which is left to the discretion of the court, and hence there is no appeal. *Blake v. Everett*, 1 Allen 248, 251.

As to the object of this section, see *Oliver v. Colonial Gold Co.*, 11 Allen 283, 285.

SECT. 59. This section applies to civil actions in the municipal court of the city of Boston. St. 1867, c. 355, s. 2.

*Agreements of Parties.*

SECT. 60. This section applies to civil actions in the municipal court of the city of Boston. St. 1867, c. 355, s. 2.

"*All agreements \* \* \* shall be in writing.*" An admission in writing, made by an attorney, will not be valid, if it is such an admission as he was not authorized to make as the agent of his client. *Saunders v. McCarthy*, 8 Allen 42, 45.

SECT. 61. This section applies to civil actions in the municipal court of the city of Boston. St. 1867, c. 355, s. 2.

*Offer of Judgment.*

SECT. 62. "*Offers in court.*" Where an offer is filed *in vacation*, and continues on file until the next term, it then first becomes operative, and should be entered of record as of the first day of that term. *Madden v. Brown*, 97 Mass. 148, 150.

*Form of Offer of Judgment.*

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT. SUFFOLK, ss.

January Term, 1869.

J. D. v. R. R.

And now comes the defendant in the above-entitled action, and offers and consents to be defaulted, and that judgment be rendered against him as damages for the sum of one hundred dollars. By his attorneys,

T. & C.

SECT. 63. If the offer is filed in vacation, and consequently does not take effect until the first day of the following term, the plaintiff is entitled to his costs for travel and term fees for that term. *Madden v. Brown*, 97 Mass. 148, 150.

•  
*Hearing, Trial, Evidence.*

SECT. 64. "*And his decision \* \* \* shall be final.*" It seems that there is no appeal from the decision of a single judge upon a demurrer in any case, if the demurrer is not raised on the ground that the facts alleged will not "in point of law support or answer the action." *Minturn v. Manufacturers' Insurance Co.*, 10 Gray 501, 504.

"*That the facts do not in point of law,*" &c. See *Amherst & Belchertown R.R. Co. v. Watson*, 4 Gray 60, 62.

No appeal can be taken from a judgment for the plaintiff on a demurrer to a declaration in set-off, until the issues raised by the defendant's answer have been tried. *Stetson v. Exchange Bank*, 7 Gray 425.

SECT. 67. "*May file exceptions.*" This is the only way in which the case can be carried to the supreme court. The decision of the court on matters of fact is not subject to exception or appeal. *Lincoln v. Parsons*, 1 Allen 388. — *Bass v. Haverhill Mutual Fire Insurance Co.*, 10 Gray 400. — *Kettell v. Foote*, 3 Allen 212. — *Wheton v. Nichols*, 3 Allen 583.

The report of the judge must show sufficient facts to sustain his decision in law. *Miller v. Robinson*, 2 Allen 610.

"The only proper method of presenting questions of law by exceptions is, either by having a distinct statement made of the ruling or opinion of the court on the matters of law involved in the issue, or by asking for specific rulings which the parties deem applicable to the case as presented by the evidence." *Kettell v. Foote*, 3 Allen 212.

SECT. 71. This section applies to civil actions in the municipal court of the city of Boston. St. 1867, c. 355, s. 2.

"*Unnecessary counts and statements.*" See *Woodbury v.*

Jones, 3 Gray 261, 263. — Stone v. White, 8 Gray 589, 595. — Whitney v. Rhoades, 3 Allen 471, 472.

SECT. 72. "*Evidence on the trial.*" Under this section the declaration, answer, &c., cannot be used as evidence, in the action in which they are filed, either *for or against* the party filing them. Walcott v. Kimball, 13 Allen 460, 462. — Brooks v. Wright, 13 Allen 72, 78. See, however, Boston Acid Manufacturing Co. v. Moring, 15 Gray 211, 215.

But the averments contained in a declaration have been held to be competent evidence against the plaintiff *in another action* brought against him, although it is not proved that he dictated or had knowledge of the precise averments. Bliss v. Nichols, 12 Allen 443, 445. — Walcott v. Kimball, 13 Allen 460, 462, note.

As to the rule in criminal cases, see Commonwealth v. Lannan, 13 Allen 563, 569.

SECT. 75. "*Answers two or more matters in defence.*" A tender is not matter in defence. Bacon v. Charlton, 7 Cush. 581, 585.

See Baldwin v. Gregg, 13 Met. 253.

SECT. 76. "*Justifies that the words spoken,*" &c. As to the effect of admitting in such justification that the words were spoken, see Alderman v. French, 1 Pick. 1. — St. 1826, c. 107. — Gen. St. c. 129, s. 76.

SECT. 78. This section applies to civil actions in the municipal court of the city of Boston. St. 1867, c. 355, s. 2.

The familiar rule that a judgment is conclusive between the parties, is not changed by this section, except in actions on "a judgment obtained by default and without the knowledge of the defendant." If the parties to a submission to arbitration under the statute appear and are heard before the arbitrator, a judgment upon his award is not open to dispute under this section. Brigham v. Burnham, 12 Allen 97.

*Arrest of Judgment.*

SECT. 79. The provisions of this section apply to the actions at law which are the subject of the preceding sections of this chapter, and do not apply to charges of fraud made by a creditor against his debtor on his application to be admitted to take the poor debtor's oath. *Chamberlain v. Hoogs*, 1 Gray 172.

*"Existing before the verdict."* It seems that the provisions of this section do not apply in cases where no verdict is rendered, as in case of a default. *Hollis v. Richardson*, 13 Gray 392, 393. See also St. 1852, c. 312, s. 22.

*"Unless the same affects," &c.* It seems that objections to the jurisdiction may be taken at any time before, or even after judgment. *Elder v. Dwight Manufacturing Co.*, 4 Gray 201, 204.

See *Hill v. Dunham*, 7 Gray 543. — *Emery v. Osgood*, 1 Allen 244.

*"No defect," &c.* When the ad damnum in a writ exceeded the amount to which the jurisdiction of the court was limited, it was held that the court had no jurisdiction, although the actual amount in controversy was within the limit, and that this was not a simple defect within the meaning of this clause. *Ashuelot Bank v. Pearson*, 14 Gray 521. — *McQuade v. O'Neil*, 15 Gray 52.

*General Provisions.*

SECT. 81. *"Any rule of evidence."* In an action of tort for the conversion of goods, it was held that the evidence must be such as would have proved a conversion in an action of trover at the common law. *Robinson v. Austin*, 2 Gray 564. So also an action of tort for breaking and entering a close can be maintained only upon evidence which would support the action of trespass quare clausum fregit. *Parsons v. Smith*, 5 Allen 578. In accordance with the common-law rule, special damages cannot be recovered unless they are specially averred in the

declaration. *Baldwin v. Western Railroad Corporation*, 4 Gray 333. — *Warner v. Bacon*, 8 Gray 397.

SECT. 82. "*Shall be conclusive evidence of the identity of the cause of action.*" As to the object of this provision, see *Mann v. Brewer*, 7 Allen 202, 204.

"*Or bail.*" See *Wood v. Denny*, 7 Gray 540. — *Brown v. Howe*, 3 Allen 528.

"*Or any person,*" &c. A surety on a bond to dissolve an attachment comes under this head; and, further, as to what is the true interpretation of this statute, see *Tucker v. White*, 5 Allen 322.

SECT. 87. *Schedule of forms.*

*Forms of Declarations in Actions of Contract.*

"*Commencement.*" As to the form in which an administrator or an assignee in insolvency should state his character, see *Brigham v. Coburn*, 10 Gray 329.

"*Count for money had and received.*" Under this count only the sum received by the defendant to the plaintiff's use is recoverable, and if the plaintiff wishes to recover interest prior to the date of the writ, or expenses incurred, other counts must be inserted accordingly. *Ordway v. Colcord*, 14 Allen 59.

"*Goods sold.*" The price of grass or of timber growing on the land of the vendor cannot be recovered under this or under any other of the common counts. *Stearns v. Washburn*, 7 Gray 187. — *Richardson v. Crooker*, 7 Gray 190.

"*Work.*" This form of count may be used to recover money due on a special contract which has been fully performed on the part of the plaintiff so as to leave a mere debt or duty on the part of the defendant. *Morse v. Potter*, 4 Gray 292. So also a plaintiff who has performed work under a written contract, though not in accordance with its terms, may recover under this count the amount by which he has benefited the defendant. *Cardell v. Bridge*, 9 Allen 355.

"*Use and occupation.*" Rent due upon a written lease can-



not be recovered under this form of count. *Warren v. Ferdinand*, 9 Allen 357.

“*Insimul computassent.*” As to the evidence required to support this count, see *Charman v. Henshaw*, 15 Gray 293.

“*Account annexed.*” Under this form a plaintiff may recover the amount due him according to the terms of a special contract, although he has not performed the services stipulated by such contract, provided that he has been ready and willing to perform them, but has been prevented by the defendant. *Johnson v. Trinity Church Society*, 11 Allen 123.

“*Payee of note against maker.*” For a declaration to recover the balance due on a note, see *Moore v. Royce*, 10 Allen 556.

*Other Forms of Declarations in Actions of Contract.*

See notes on section 2 of this chapter.

As to the form of declaration in an action for damages for the breach of an executory contract for labor and services, see *Mullaly v. Austin*, 97 Mass. 30, 33.

As to the form of declaration in an action on a judgment, see *O'Neal v. Kittredge*, 3 Allen 470.

A declaration on a recognizance to prosecute an appeal must aver that the recognizance was returned to the appellate court, and there entered of record, and, it seems, must also show that the court, in which the recognizance was taken, had jurisdiction of the action. *Tarbell v. Gray*, 4 Gray 444.

As to the proper form of declaration in an action against a warehouseman for failure to deliver goods intrusted to him, see *Cass v. Boston & Lowell R.R. Co.*, 14 Allen 448, 451, 458.

The following are offered as forms for declarations upon drafts and bills of exchange, being based upon forms given in 2 Greenl. Ev. s. 155, note:—

*By Indorsee against Drawer.*

And the plaintiff says the defendant made a bill of exchange, a copy of which, with the indorsements thereon, is hereto annexed, payable to the order of G. H., who indorsed the same to the plaintiff. And the said bill was duly presented for acceptance to X. Y., the drawee therein named, who

refused to accept the same, of all which the defendant had due notice. And the defendant owes the plaintiff the amount of said bill and interest thereon.

*By Indorsee against Acceptor.*

And the plaintiff says one E. F. made a bill of exchange, a copy of which with the indorsements thereon is hereto annexed, payable to the order of G. H. And the defendant, the drawee named in said bill, duly accepted the same, and the said G. H. then indorsed the said bill to J. K., who indorsed it to the plaintiff. And the defendant owes the plaintiff the amount of said bill and interest thereon.

*By Drawer against Acceptor.*

And the plaintiff says he made a bill of exchange, a copy of which with the indorsements thereon is hereto annexed, payable to the order of G. H., and the defendant, the drawee therein named, accepted the same. And the said bill was duly presented to the defendant for payment on the day when it became due, but the defendant did not pay the same. And the defendant owes the plaintiff the amount of said bill and interest thereon.

*By Indorsee against Indorser.*

And the plaintiff says that one E. F. made a bill of exchange, a copy of which with the indorsements thereon is hereto annexed, payable to the order of the defendant, who indorsed the same to the plaintiff. And the said bill was duly presented for acceptance to X. Y., the drawee therein named, who refused to accept the same, of all which the defendant had due notice. And the defendant owes the plaintiff the amount of said bill and interest thereon.

*Forms of Declarations in Actions of Tort.*

*The ad damnum.* Special damages must be specially alleged. *Baldwin v. Western R.R. Corporation*, 4 Gray 333. — *Adams v. Barry*, 10 Gray 361. — *Parker v. Lowell*, 11 Gray 353. — *Prentiss v. Barnes*, 6 Allen 410.

“*Deceit.*” In order to support an action for deceit it is necessary to allege and prove that the defendant *knew* his representations to be false, and not simply that he had *reasonable cause to believe* that they were false. *Pearson v. Howe*, 1 Allen 207.

As to the necessary allegations in an action for deceit, see also *Nowlan v. Cain*, 3 Allen 261.

“*Negligence of town.*” See *Jones v. Andover*, 10 Allen 18.

“*Slander.*” A declaration alleging that “the defendant, publicly, falsely, and maliciously accused the plaintiff of the crime of larceny, in words substantially as follows: ‘He is a thief,’ is bad, because it does not show that the words were spoken of the plaintiff.” *Baldwin v. Hildreth*, 14 Gray 221. See *Chenery v. Goodrich*, 98 Mass. 224.

If the words are not set forth *substantially* as they were spoken, or if in any other respect the declaration is not in accordance with the prescribed form, the deficiency or irregularity may be taken advantage of by demurrer under the second clause of section 12 of this chapter. *Lee v. Kane*, 6 Gray 495. — *Baldwin v. Soule*, 6 Gray 321. — *Clay v. Brigham*, 8 Gray 161. — *Doherty v. Brown*, 10 Gray 250.

“It may be stated, as a general rule, that the evidence substantially varies from the count in slander, when it proves a charge of an offence not identically the same with that alleged, though of the same species.” *Payson v. Macomber*, 3 Allen 69, 72.

“*If the natural import of the words,*” &c. It must appear that the words set forth, when interpreted by the light of the extrinsic facts alleged, are fairly capable of a slanderous meaning, and the language used must be read and interpreted by the court as it would ordinarily be understood. *Goodrich v. Hooper*, 97 Mass. 1, 5. — *Tebbetts v. Goding*, 9 Gray 254. — *Gardner v. Dyer*, 5 Gray 23. See also *Chenery v. Goodrich*, 98 Mass. 224.

“*Trespass on land.*” It is not necessary to allege the time of the trespass. *Knapp v. Slocumb*, 9 Gray 73.

“*Penalty.*” These forms show that it is not now necessary in any action for a penalty imposed by the statute to allege that the offence was committed “against the form of the statute.” Further, as to the form of declaration in *qui tam* actions, see *Levy v. Gowdy*, 2 Allen 320.

*Other Forms of Declarations in Actions of Tort.*

For a declaration in an action of tort for a nuisance, see *Codman v. Evans*, 7 Allen 431.

*Forms of Answers in Actions of Tort.*

“*Slander.*” It is no defence to an action for slander by words imputing unchastity to a woman, to show that the defendant believing the words to be true, spoke them to her, and was led to do so by her general conduct, and especially by her deportment with a particular man. Evidence that the plaintiff’s general reputation is bad, independently of the slander of which she complains, and that it was bad ten years before, and at another place, is admissible in mitigation of damages, although no such ground of defence is set up in the answer; but evidence of particular instances of her misconduct is not admissible. *Parkhurst v. Ketchum*, 6 Allen 406.

The defence that the words were privileged or justified by the occasion, is not open, unless it is distinctly set forth in the answer. *Goodwin v. Daniels*, 7 Allen 61.

A denial of having spoken the words charged, and an averment of their truth, are consistent defences, and may be separately stated in the same answer. *Payson v. Macomber*, 3 Allen 69, 73.

*Form of Answer in Action of Replevin.*

It is a good answer to an action of replevin, that the property described in the writ is not the property of the plaintiff. 6 Allen 227. See also, as to the proper form of an answer in replevin, *Chase v. Allen*, 5 Allen 599. — *Bartlett v. Brickett*, 98 Mass. 521.

## CHAPTER CXXX.

## OF SET-OFF AND TENDER.

*Set-off.*

SECT. 1. “The court has recognized the principle of sustaining a defence to an action by allowing demands to operate by way

either of set-off or of payment, although existing (nominally) in the form of demands on the part of the defendant against another person than the plaintiff, where it was necessary so to do to prevent fraud or manifest injustice." *Green v. Nelson*, 12 Met. 567, 573. — *Stockbridge v. Damon*, 5 Pick. 223. — *Sargent v. Southgate*, 5 Pick. 312.

Where the defendant held a bond executed by the plaintiff and others, which bond was several as well as joint, it was held that the amount due on the bond might be set off as a mutual demand. *Donelson v. Colerain*, 4 Met. 430, 432.

When the first indorsee of a promissory note negotiates it after it is dishonored, and the second indorsee brings an action thereon against the maker or first indorser, the defendant can not set off any claim which he has against the first indorsee, except such as existed at the time of the transfer of the note to the plaintiff, although he had no notice of such transfer when he acquired his claim. *Baxter v. Little*, 6 Met. 7.

A. borrowed money of an insurance company, and gave a promissory note therefor, payable in one year to the order of B., who at the same time, for the accommodation of A., indorsed it to the company, and it was held that B. could not set off, against the company's demand on the note, the claims of A. against the company on a certain policy of insurance. *St. Louis Perpetual Insurance Co. v. Homer*, 9 Met. 39.

In a suit by the indorsee against the maker of a promissory note payable on demand, the maker is entitled to set off a judgment recovered by him against the promisee, provided that such judgment is not founded on a matter arising after notice of the indorsement was given to the maker. *Lewis v. Brooks*, 9 Met. 367. See also *Gen. St. c. 53, s. 10*.

In a suit by a surviving partner to recover a debt due to the firm, the defendant may set off a debt due to him from the surviving partner alone. *Holbrook v. Lackey*, 13 Met. 132, 134. See also *Commonwealth v. Phoenix Bank*, 11 Met. 129, 136.

SECT. 3. "*Unless it is for a sum that is liquidated,*" &c. A town may, in a suit brought against it by a person who has been appointed its collector of taxes, set off a claim on the official bond of such collector for money received by him for taxes, and which he has not accounted for, nor paid over. See *Donelson v. Colerain*, 4 Met. 430. — *St. Louis Perpetual Insurance Co. v. Homer*, 9 Met. 39, 42.

Taxes are not the subject of set-off. *Peirce v. City of Boston*, 3 Met. 520.

SECT. 4. "*In his own right.*" This section manifestly refers to cases of executors, administrators, trustees, and all parties suing or sued in a representative capacity. *Holbrook v. Lackey*, 13 Met. 132, 135. See also notes on section 1.

SECT. 5. This section was not intended to apply to negotiable paper, but only to demands in which the assignee takes only an equitable interest, and where the legal title and the right of action still remain in the assignor. *Cook v. Mills*, 5 Allen 36. — *Commonwealth v. Phoenix Bank*, 11 Met. 129, 136. — *Pettee v. Prout*, 3 Gray 502, 504.

SECT. 7. For a case in which the plaintiff demurred to the defendant's declaration in set-off, on the ground that his own demand was not the subject of set-off, being a claim for unliquidated damages, and the demurrer was sustained, see *Montague v. Boston & Fairhaven Iron Works*, 97 Mass. 502, 504.

SECT. 8. "*If there are several defendants, the demand set off shall be due to all of them jointly.*" The fact that two defendants stand in the relation of principal and surety, will not take the case out of this rule, and enable the defendant who is principal to set off his separate claim against the plaintiff. *Warren v. Wells*, 1 Met. 80.

SECT. 10. See *Goodwin v. Cunningham*, 12 Mass. 193, 195.

SECT. 11. "*In trust or for the use and benefit of another.*" It is not necessary that this trust or beneficial interest should

appear on the record. *Sheldon v. Kendall*, 7 Cush. 217, 218.

SECT. 12. As to set-off in the settlement of the insolvent estates of deceased persons, see *Aldrich v. Campbell*, 4 Gray 284, 286.

SECT. 15. Where A. recovered a judgment for costs against an administrator, who sued him in his capacity as administrator, and who, in the same capacity, recovered a judgment against A., it was held that the administrator might require one execution to be set off against the other, although on the execution against him, it being for costs only, he was personally liable. *Jones v. Carpenter*, 9 Met. 509, 511.

See also *Lovell v. Nelson*, 11 Allen 101, 104. — *Stickney v. Clement*, 7 Gray 170.

SECT. 16. "*Shall file with his answer,*" &c. Evidence of a set-off is not admissible, unless the set-off is pleaded. *Skinner v. King*, 4 Allen 498. If the declaration in set-off is not filed with the answer, it is competent for the court to allow it to be filed afterwards. *Higby v. Upton*, 3 Met. 411.

"*A declaration in set-off.*" As to the form of such a declaration, see *Parker v. Sanborn*, 7 Gray 191, 194.

SECT. 17. "*The subsequent allegations and pleadings.*" The plaintiff may file a set-off to the defendant's set-off. *Galligan v. Fannan*, 9 Allen 192.

When the defendant admits the plaintiff's cause of action, and the only issue for the jury is on the defendant's declaration in set-off, the plaintiff is still entitled to open and close the case. *Page v. Osgood*, 2 Gray 260.

See also *Parker v. Sanborn*, 7 Gray 191, 194.

SECT. 18. The statute of limitation in favor of executors and administrators can, by virtue of the provisions of this section, be pleaded in answer to claims in set-off. *Lovell v. Nelson*, 11 Allen 101, 103. — Gen. St. 97, s. 5.

See also *Buffum v. Deane*, 4 Gray 385, 393.

SECT. 19. "*He shall have judgment,*" &c. As to the effect

of such judgment as a bar to any subsequent action by the defendant on a demand embraced in his declaration in set-off, see *Sargent v. Fitzpatrick*, 4 Gray 511, 513.

SECT. 21. Where, after a set-off was filed, the action was referred to an auditor, it was held that each party had power to proceed and take out a commission and procure a report, and that, if the action was subsequently dismissed, owing to the neglect of both parties to proceed, the defendant was not entitled to costs. *Lapham v. Norris*, 10 Cush. 312, 313.

*Tender.*

SECT. 23. "*Contract for the payment of money.*" See *Lawrence v. Gifford*, 17 Pick. 366, 369.

SECT. 24. "*With the legal costs.*" Costs must be added, if the writ has been sent to the sheriff, although it may not have been actually served. *Emerson v. White*, 10 Gray 351.

"*Four days.*" Sunday is not to be counted. *Robbins v. Holman*, 11 Cush. 26, 29. — *Thayer v. Felt*, 4 Pick. 354.

## CHAPTER CXXXI.

### OF WITNESSES AND EVIDENCE.

*Witnesses.*

The party producing a witness "shall not be allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also prove that he has made at other times statements inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statements, and, if so, allowed to explain them." St. 1869, c. 425.

SECT. 1. Witnesses may be summoned before certain city



or town officers. St. 1863, c. 158. And before the executive council. St. 1861, c. 166.

Summons of justices of the peace may be served in any county. St. 1863, c. 157, s. 3.

The following is the form of summons now in use : —

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

*To A. B., of Boston, in said Commonwealth, merchant, greeting :*

You are hereby required, in the name of the Commonwealth of Massachusetts, to make your appearance before the Superior Court, at the first session thereof for civil business, holden at Boston, within and for the county of Suffolk, on the eighth day of January, current, at nine o'clock in the forenoon, and from day to day thereafter until the action hereinafter named is heard by said court, to give evidence of what you know relating to an action of contract then and there to be heard and tried between John Doe, plaintiff, and Richard Roe, defendant.

Hereof fail not, as you will answer your default under the pains and penalty in the law in that behalf made and provided.

Dated at Boston this seventh day of January, A.D. 1869.

X. Y., *Justice of the Peace.*

The above form is founded on one given in St. 1784, c. 28, s. 5.

SECT. 3. As to whether a witness, after having appeared, is bound, without the payment of his daily fees, to attend from day to day until the trial is ended, see 1 Greenl. Ev. s. 310. — *Bliss v. Brainard*, 42 N. H. 255, 256.

SECT. 4. A party bringing an action under this section cannot show, as an excuse for not paying or tendering the proper fees, that the witness waived his right to them. *Robinson v. Trull*, 4 Cush. 249.

SECT. 6. The power to punish for contempt in not appearing as a witness must be exercised while the case is pending, or at least before the adjournment of the court. *Clarke's case*, 12 Cush. 320. See also *Piper v. Pearson*, 2 Gray 123.

SECT. 8. Where a commission to take a deposition to be used in another state directs the witness to lay his hand on

and kiss the gospels, such directions may be followed. *Commonwealth v. Smith*, 11 Allen 243.

SECT. 11. If a witness is "affirmed," the presumption is that it was done according to law. *Lincoln v. Taunton Copper Manufacturing Co.*, 11 Cush. 400.

SECT. 13. It is no objection to the competency of testimony, that it is given under inducements which would render it inadmissible in evidence against the witness in a criminal case. *Newhall v. Jenkins*, 2 Gray 562.

Nor is it any objection that the witness is at the time under sentence for crime, being brought from prison by habeas corpus for the purpose of testifying. *Newhall v. Jenkins*, 2 Gray 562.

"Any crime." See *Commonwealth v. Hall*, 4 Allen 305. See also St. 1869, c. 425.

SECT. 14. "*Parties in civil actions and proceedings.*" That 56,440-5062  
is, parties to the record. *Bigelow v. Heyer*, 3 Allen 243. — 6" 362.  
*Chamberlin v. Chamberlin*, 4 Allen 184. — Gay v. Gay, 5 Allen 7" 52.  
157. — *Palmer v. White*, 10 Cush. 321. — *Snell v. Westport*, 9" 508.  
Gray 321. See also *Crompton v. Anthony*, 13 Allen 33, 36. — 71,141,147,321,  
11" 299,440,  
11" 27,129,130,  
12" 223,376.  
12" 45,303,  
13" 360,459.

A complaint for flowing land is a "civil action or proceeding." *Hosmer v. Warner*, 15 Gray 46, 48.

"Divorce suits." See *Foss v. Foss*, 12 Allen 26.

"Except those," &c. This exception is virtually struck out by St. 1866, c. 148, s. 5.

"Shall be admitted as competent witnesses." If experts, they may state their opinions. *Dickenson v. Fitchburg*, 13 Gray 546. They may state their own intentions, if material to the issue. *Fisk v. Chester*, 8 Gray 506. — *Thacher v. Phinney*, 7 Allen 149. — *Lombard v. Oliver*, 7 Allen 155.

"Private conversations with each other." *French v. French*, 14 Gray 186, 188. — *Robinson v. Talmadge*, 97 Mass. 171.

"Provided," &c. It seems that this proviso is not intended to affect cases where the party could testify before the statute. *Dexter v. Booth*, 2 Allen 559. Under this proviso an execu- 97,172,174,505,509,  
98,172,174,505,509,  
99,172,174,505,509,  
100,172,174,505,509,  
101,172,174,505,509,  
102,172,174,505,509,  
103,172,174,505,509,  
104,172,174,505,509,  
105,172,174,505,509,  
106,172,174,505,509,  
107,172,174,505,509,  
108,172,174,505,509,  
109,172,174,505,509,  
110,172,174,505,509,  
111,172,174,505,509,  
112,172,174,505,509,  
113,172,174,505,509,  
114,172,174,505,509,  
115,172,174,505,509,  
116,172,174,505,509,  
117,172,174,505,509,  
118,172,174,505,509,  
119,172,174,505,509,  
120,172,174,505,509,  
121,172,174,505,509,  
122,172,174,505,509,  
123,172,174,505,509,  
124,172,174,505,509,  
125,172,174,505,509,  
126,172,174,505,509,  
127,172,174,505,509,  
128,172,174,505,509,  
129,172,174,505,509,  
130,172,174,505,509,  
131,172,174,505,509,  
132,172,174,505,509,  
133,172,174,505,509,  
134,172,174,505,509,  
135,172,174,505,509,  
136,172,174,505,509,  
137,172,174,505,509,  
138,172,174,505,509,  
139,172,174,505,509,  
140,172,174,505,509,  
141,172,174,505,509,  
142,172,174,505,509,  
143,172,174,505,509,  
144,172,174,505,509,  
145,172,174,505,509,  
146,172,174,505,509,  
147,172,174,505,509,  
148,172,174,505,509,  
149,172,174,505,509,  
150,172,174,505,509,  
151,172,174,505,509,  
152,172,174,505,509,  
153,172,174,505,509,  
154,172,174,505,509,  
155,172,174,505,509,  
156,172,174,505,509,  
157,172,174,505,509,  
158,172,174,505,509,  
159,172,174,505,509,  
160,172,174,505,509,  
161,172,174,505,509,  
162,172,174,505,509,  
163,172,174,505,509,  
164,172,174,505,509,  
165,172,174,505,509,  
166,172,174,505,509,  
167,172,174,505,509,  
168,172,174,505,509,  
169,172,174,505,509,  
170,172,174,505,509,  
171,172,174,505,509,  
172,172,174,505,509,  
173,172,174,505,509,  
174,172,174,505,509,  
175,172,174,505,509,  
176,172,174,505,509,  
177,172,174,505,509,  
178,172,174,505,509,  
179,172,174,505,509,  
180,172,174,505,509,  
181,172,174,505,509,  
182,172,174,505,509,  
183,172,174,505,509,  
184,172,174,505,509,  
185,172,174,505,509,  
186,172,174,505,509,  
187,172,174,505,509,  
188,172,174,505,509,  
189,172,174,505,509,  
190,172,174,505,509,  
191,172,174,505,509,  
192,172,174,505,509,  
193,172,174,505,509,  
194,172,174,505,509,  
195,172,174,505,509,  
196,172,174,505,509,  
197,172,174,505,509,  
198,172,174,505,509,  
199,172,174,505,509,  
200,172,174,505,509,  
201,172,174,505,509,  
202,172,174,505,509,  
203,172,174,505,509,  
204,172,174,505,509,  
205,172,174,505,509,  
206,172,174,505,509,  
207,172,174,505,509,  
208,172,174,505,509,  
209,172,174,505,509,  
210,172,174,505,509,  
211,172,174,505,509,  
212,172,174,505,509,  
213,172,174,505,509,  
214,172,174,505,509,  
215,172,174,505,509,  
216,172,174,505,509,  
217,172,174,505,509,  
218,172,174,505,509,  
219,172,174,505,509,  
220,172,174,505,509,  
221,172,174,505,509,  
222,172,174,505,509,  
223,172,174,505,509,  
224,172,174,505,509,  
225,172,174,505,509,  
226,172,174,505,509,  
227,172,174,505,509,  
228,172,174,505,509,  
229,172,174,505,509,  
230,172,174,505,509,  
231,172,174,505,509,  
232,172,174,505,509,  
233,172,174,505,509,  
234,172,174,505,509,  
235,172,174,505,509,  
236,172,174,505,509,  
237,172,174,505,509,  
238,172,174,505,509,  
239,172,174,505,509,  
240,172,174,505,509,  
241,172,174,505,509,  
242,172,174,505,509,  
243,172,174,505,509,  
244,172,174,505,509,  
245,172,174,505,509,  
246,172,174,505,509,  
247,172,174,505,509,  
248,172,174,505,509,  
249,172,174,505,509,  
250,172,174,505,509,  
251,172,174,505,509,  
252,172,174,505,509,  
253,172,174,505,509,  
254,172,174,505,509,  
255,172,174,505,509,  
256,172,174,505,509,  
257,172,174,505,509,  
258,172,174,505,509,  
259,172,174,505,509,  
260,172,174,505,509,  
261,172,174,505,509,  
262,172,174,505,509,  
263,172,174,505,509,  
264,172,174,505,509,  
265,172,174,505,509,  
266,172,174,505,509,  
267,172,174,505,509,  
268,172,174,505,509,  
269,172,174,505,509,  
270,172,174,505,509,  
271,172,174,505,509,  
272,172,174,505,509,  
273,172,174,505,509,  
274,172,174,505,509,  
275,172,174,505,509,  
276,172,174,505,509,  
277,172,174,505,509,  
278,172,174,505,509,  
279,172,174,505,509,  
280,172,174,505,509,  
281,172,174,505,509,  
282,172,174,505,509,  
283,172,174,505,509,  
284,172,174,505,509,  
285,172,174,505,509,  
286,172,174,505,509,  
287,172,174,505,509,  
288,172,174,505,509,  
289,172,174,505,509,  
290,172,174,505,509,  
291,172,174,505,509,  
292,172,174,505,509,  
293,172,174,505,509,  
294,172,174,505,509,  
295,172,174,505,509,  
296,172,174,505,509,  
297,172,174,505,509,  
298,172,174,505,509,  
299,172,174,505,509,  
300,172,174,505,509,  
301,172,174,505,509,  
302,172,174,505,509,  
303,172,174,505,509,  
304,172,174,505,509,  
305,172,174,505,509,  
306,172,174,505,509,  
307,172,174,505,509,  
308,172,174,505,509,  
309,172,174,505,509,  
310,172,174,505,509,  
311,172,174,505,509,  
312,172,174,505,509,  
313,172,174,505,509,  
314,172,174,505,509,  
315,172,174,505,509,  
316,172,174,505,509,  
317,172,174,505,509,  
318,172,174,505,509,  
319,172,174,505,509,  
320,172,174,505,509,  
321,172,174,505,509,  
322,172,174,505,509,  
323,172,174,505,509,  
324,172,174,505,509,  
325,172,174,505,509,  
326,172,174,505,509,  
327,172,174,505,509,  
328,172,174,505,509,  
329,172,174,505,509,  
330,172,174,505,509,  
331,172,174,505,509,  
332,172,174,505,509,  
333,172,174,505,509,  
334,172,174,505,509,  
335,172,174,505,509,  
336,172,174,505,509,  
337,172,174,505,509,  
338,172,174,505,509,  
339,172,174,505,509,  
340,172,174,505,509,  
341,172,174,505,509,  
342,172,174,505,509,  
343,172,174,505,509,  
344,172,174,505,509,  
345,172,174,505,509,  
346,172,174,505,509,  
347,172,174,505,509,  
348,172,174,505,509,  
349,172,174,505,509,  
350,172,174,505,509,  
351,172,174,505,509,  
352,172,174,505,509,  
353,172,174,505,509,  
354,172,174,505,509,  
355,172,174,505,509,  
356,172,174,505,509,  
357,172,174,505,509,  
358,172,174,505,509,  
359,172,174,505,509,  
360,172,174,505,509,  
361,172,174,505,509,  
362,172,174,505,509,  
363,172,174,505,509,  
364,172,174,505,509,  
365,172,174,505,509,  
366,172,174,505,509,  
367,172,174,505,509,  
368,172,174,505,509,  
369,172,174,505,509,  
370,172,174,505,509,  
371,172,174,505,509,  
372,172,174,505,509,  
373,172,174,505,509,  
374,172,174,505,509,  
375,172,174,505,509,  
376,172,174,505,509,  
377,172,174,505,509,  
378,172,174,505,509,  
379,172,174,505,509,  
380,172,174,505,509,  
381,172,174,505,509,  
382,172,174,505,509,  
383,172,174,505,509,  
384,172,174,505,509,  
385,172,174,505,509,  
386,172,174,505,509,  
387,172,174,505,509,  
388,172,174,505,509,  
389,172,174,505,509,  
390,172,174,505,509,  
391,172,174,505,509,  
392,172,174,505,509,  
393,172,174,505,509,  
394,172,174,505,509,  
395,172,174,505,509,  
396,172,174,505,509,  
397,172,174,505,509,  
398,172,174,505,509,  
399,172,174,505,509,  
400,172,174,505,509,  
401,172,174,505,509,  
402,172,174,505,509,  
403,172,174,505,509,  
404,172,174,505,509,  
405,172,174,505,509,  
406,172,174,505,509,  
407,172,174,505,509,  
408,172,174,505,509,  
409,172,174,505,509,  
410,172,174,505,509,  
411,172,174,505,509,  
412,172,174,505,509,  
413,172,174,505,509,  
414,172,174,505,509,  
415,172,174,505,509,  
416,172,174,505,509,  
417,172,174,505,509,  
418,172,174,505,509,  
419,172,174,505,509,  
420,172,174,505,509,  
421,172,174,505,509,  
422,172,174,505,509,  
423,172,174,505,509,  
424,172,174,505,509,  
425,172,174,505,509,  
426,172,174,505,509,  
427,172,174,505,509,  
428,172,174,505,509,  
429,172,174,505,509,  
430,172,174,505,509,  
431,172,174,505,509,  
432,172,174,505,509,  
433,172,174,505,509,  
434,172,174,505,509,  
435,172,174,505,509,  
436,172,174,505,509,  
437,172,174,505,509,  
438,172,174,505,509,  
439,172,174,505,509,  
440,172,174,505,509,  
441,172,174,505,509,  
442,172,174,505,509,  
443,172,174,505,509,  
444,172,174,505,509,  
445,172,174,505,509,  
446,172,174,505,509,  
447,172,174,505,509,  
448,172,174,505,509,  
449,172,174,505,509,  
450,172,174,505,509,  
451,172,174,505,509,  
452,172,174,505,509,  
453,172,174,505,509,  
454,172,174,505,509,  
455,172,174,505,509,  
456,172,174,505,509,  
457,172,174,505,509,  
458,172,174,505,509,  
459,172,174,505,509,  
460,172,174,505,509,  
461,172,174,505,509,  
462,172,174,505,509,  
463,172,174,505,509,  
464,172,174,505,509,  
465,172,174,505,509,  
466,172,174,505,509,  
467,172,174,505,509,  
468,172,174,505,509,  
469,172,174,505,509,  
470,172,174,505,509,  
471,172,174,505,509,  
472,172,174,505,509,  
473,172,174,505,509,  
474,172,174,505,509,  
475,172,174,505,509,  
476,172,174,505,509,  
477,172,174,505,509,  
478,172,174,505,509,  
479,172,174,505,509,  
480,172,174,505,509,  
481,172,174,505,509,  
482,172,174,505,509,  
483,172,174,505,509,  
484,172,174,505,509,  
485,172,174,505,509,  
486,172,174,505,509,  
487,172,174,505,509,  
488,172,174,505,509,  
489,172,174,505,509,  
490,172,174,505,509,  
491,172,174,505,509,  
492,172,174,505,509,  
493,172,174,505,509,  
494,172,174,505,509,  
495,172,174,505,509,  
496,172,174,505,509,  
497,172,174,505,509,  
498,172,174,505,509,  
499,172,174,505,509,  
500,172,174,505,509,  
501,172,174,505,509,  
502,172,174,505,509,  
503,172,174,505,509,  
504,172,174,505,509,  
505,172,174,505,509,  
506,172,174,505,509,  
507,172,174,505,509,  
508,172,174,505,509,  
509,172,174,505,509,  
510,172,174,505,509,  
511,172,174,505,509,  
512,172,174,505,509,  
513,172,174,505,509,  
514,172,174,505,509,  
515,172,174,505,509,  
516,172,174,505,509,  
517,172,174,505,509,  
518,172,174,505,509,  
519,172,174,505,509,  
520,172,174,505,509,  
521,172,174,505,509,  
522,172,174,505,509,  
523,172,174,505,509,  
524,172,174,505,509,  
525,172,174,505,509,  
526,172,174,505,509,  
527,172,174,505,509,  
528,172,174,505,509,  
529,172,174,505,509,  
530,172,174,505,509,  
531,172,174,505,509,  
532,172,174,505,509,  
533,172,174,505,509,  
534,172,174,505,509,  
535,172,174,505,509,  
536,172,174,505,509,  
537,172,174,505,509,  
538,172,174,505,509,  
539,172,174,505,509,  
540,172,174,505,509,  
541,172,174,505,509,  
542,172,174,505,509,  
543,172,174,505,509,  
544,172,174,505,509,  
545,172,174,505,509,  
546,172,174,505,509,  
547,172,174,505,509,  
548,172,174,505,509,  
549,172,174,505,509,  
550,172,174,505,509,  
551,172,174,505,509,  
552,172,174,505,509,  
553,172,174,505,509,  
554,172,174,505,509,  
555,172,174,505,509,  
556,172,174,505,509,  
557,172,174,505,509,  
558,172,174,505,509,  
559,172,174,505,509,  
560,172,174,505,509,  
561,172,174,505,509,  
562,172,174,505,509,  
563,172,174,505,509,  
564,172,174,505,509,  
565,172,174,505,509,  
566,172,174,505,509,  
567,172,174,505,509,  
568,172,174,505,509,  
569,172,174,505,509,  
570,172,174,505,509,  
571,172,174,505,509,  
572,172,174,505,509,  
573,172,174,505,509,  
574,172,174,505,509,  
575,172,174,505,509,  
576,172,174,505,509,  
577,172,174,505,509,  
578,172,174,505,509,  
579,172,174,505,509,  
580,172,174,505,509,  
581,172,174,505,509,  
582,172,174,505,509,  
583,172,174,505,509,  
584,172,174,505,509,  
585,172,174,505,509,  
586,172,174,505,509,  
587,172,174,505,509,  
588,172,174,505,509,  
589,172,174,505,509,  
590,172,174,505,509,  
591,172,174,505,509,  
592,172,174,505,509,  
593,172,174,505,509,  
594,172,174,505,509,  
595,172,174,505,509,  
596,172,174,505,509,  
597,172,174,505,509,  
598,172,174,505,509,  
599,172,174,505,509,<

tor is not a competent witness in his own behalf to support a charge in his probate account for money paid to himself for services rendered by him to his testator during his lifetime. *Ela v. Edwards*, 97 Mass. 318.

“*The contract or cause of action in issue and on trial.*” A marriage contract is included. *Little v. Little*, 13 Gray 264. See also *Fischer v. Morse*, 9 Gray 440. — *Ayres v. Ayres*, 11 Gray 130. — *Smith v. Smith*, 1 Allen 231. — *Baxter v. Knowles*, 12 Allen 114. — *Flynn v. Coffee*, 12 Allen 133. — *Bliss v. Franklin*, 13 Allen 244.

“The test of competency is ‘the contract or cause of action in issue and on trial,’ not the fact to which the party is called to testify. If the cause of action was a matter transacted with a person who has deceased, the other party to that transaction, being also party to the suit, is not admitted as a witness at all, and cannot testify to any fact in the case. Otherwise he is admitted as a witness, and, being so admitted, the statute contains no restriction nor limitation as to the facts to which his testimony may or may not be directed. His competency must be determined in advance by the nature of the controversy and the questions in issue. If, upon that test, he is admitted as a witness in the case, his testimony is competent for all purposes, although it may relate to transactions with a person since deceased, which prove to be involved in or to affect the matter in dispute.” Per WELLS, J., in *Granger v. Bassett*, 98 Mass. 462, 468, in which case it was held that, on the hearing of a probate appeal from a decree accepting the account of an executor, such executor, having been properly admitted as a witness generally in the case, might testify as to payments made by himself to his testatrix in her lifetime.

“*Insane.*” That is, so as not to be able to testify. *Kendall v. May*, 10 Allen 59. See also *Little v. Little*, 13 Gray 264. — *Doud v. Hall*, 8 Allen 410.

“*The other party.*” That is, party to the record. *Gay v. Gay*, 5 Allen 157. — *Jones v. Wolcott*, 15 Gray 541. If one

of several joint plaintiffs or defendants is dead, the other party is not excluded. *Hayward v. French*, 12 Gray 455. — *Brady v. Brady*, 8 Allen 101. — *Doody v. Pierce*, 9 Allen 141. — *Goss v. Austen*, 11 Allen 525. In an action by the indorsee against the maker of a note, if the payee is dead, the maker cannot testify, but the plaintiff can. *Byrne v. McDonald*, 1 Allen 293. *140d. 207.* If the original plaintiff is dead, and the suit is prosecuted by his administrator, one of several defendants cannot testify, in favor of the others, to facts which affect them alone. *Pettingill v. Porter*, 3 Allen 349.

*"Acts."* These include the admissions of an administrator. *Lincoln v. Lincoln*, 12 Gray 45.

*"Appointment of the administrator."* The defendant, in an action brought by an administrator de bonis non, may testify as to acts done or contracts made, before the plaintiff's appointment, but after the appointment of the original administrator. *Palmer v. Kellogg*, 11 Gray 27.

This section does not, by allowing parties to be witnesses, affect the rule requiring deeds to be proved by the attesting witnesses. *Brigham v. Palmer*, 3 Allen 450. Neither does it affect the rule that a written contract cannot be varied by parol. *Kelly v. Cunningham*, 1 Allen 473.

Executors, administrators, guardians, trustees, assignees, &c., who are parties, may be witnesses, notwithstanding the death or insanity of one of the original parties. St. 1864, c. 304, s. 1. — *Howe v. Merrick*, 11 Gray 129.

When the deposition of a party deceased or insane is read, the other party may testify. St. 1864, c. 304, s. 2. — St. 1867, c. 212.

Where the contract was made with an agent, the death or insanity of his principal will not prevent any party to the suit or proceeding from being a witness in the case, provided such agent is living and competent to testify. St. 1865, c. 207, s. 1. See also *Brown v. Brightman*, 11 Allen 226.

Where the contract was made with the wife of the party

in the absence of her husband, it was held that she might testify, except as to private conversations, although not joined in the suit. St. 1865, c. 207, s. 2. — *Burke v. Savage*, 13 Allen 408.

The incompetency of a wife to testify against her husband, when she is not a party, is not removed by the statute provisions, except as provided in section 16 of this chapter. *Kelly v. Drew*, 12 Allen 107, 109.

SECT. 15. This section renders the two preceding ones inapplicable to attesting witnesses, only when they are acting strictly in that capacity. *Wyman v. Symmes*, 10 Allen 153.

See *In re Arthur White* (Prob. Ct. Suf.), 22 Law Reporter, 113.

#### *Depositions.*

SECT. 17. It seems that a deposition can be used only by the person at whose request it was taken, or by those who by the rules of law claim under him, and only against those duly notified. *Welles v. Fish*, 3 Pick. 74, 80.

SECT. 18. "*Is about to go out of the state, and not to return in time for the trial.*" It is sufficient if it appears to the justice that there is reasonable cause for apprehending such departure. *Livesey v. Bennett*, 14 Gray 130.

The following is a form of summons to the person whose deposition is to be taken:—

#### COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

*To E. F., of Boston, in said Commonwealth, greeting:*

Whereas C. D., of Worcester, in said Commonwealth, has requested me to take your deposition to be used in an action of contract now pending between him and A. B. of said Boston, you are hereby required in the name of the Commonwealth of Massachusetts to appear before me at 11 A.M., on the third day of January, A.D. 1869, at my office, at No. 19 Court Street, in said Boston, being the time and place appointed for taking the said deposition, then and there to testify what you know relating to the said action.

Hereof fail not, as you will answer your default under the pains and penalty in the law in that behalf made and provided.

Dated at Boston, this first day of January, A.D. 1869.

X. Y., *Justice of the Peace.*

The form on which this is founded, may be found in St. 1797, c. 35, s. 4.

SECT. 19. "*Service of process.*" See *Crompton v. Anthony*, 13 Allen 33.

The following will serve for a form for a notice to the adverse party under this section : —

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

To A. B., of Boston, in said Commonwealth, greeting :

Whereas C. D., of Worcester, in said Commonwealth, has requested me to take the deposition of E. F., of said Boston, to be used in an action now pending between you and the said C. D., you are hereby notified to appear before me at 11 A.M., on the 3d day of January, A.D. 1869, at my office, at No. 19 Court Street, in said Boston, being the time and place appointed for taking the said deposition, then and there to put such interrogatories as you think fit.

Dated at Boston this 1st day of January, A.D. 1869.

X. Y., *Justice of the Peace.*

The form on which this is founded may be found in St. 1797, c. 35, s. 2.

"*At the time and place appointed,*" &c. The courts have, under the 31st section of this chapter, made rules regulating the time and place for taking depositions. See law rules of supreme court, rule VIII. — Rules of superior court, rule IX. — Rules of the municipal court of the city of Boston, rule XX.

Depositions in suits in equity must be taken before a justice of the peace who is either a judge of the superior court, a judge of probate, or an attorney-at-law, not interested or of counsel in the cause. In other respects, they are taken like depositions in actions at law. Equity rules of supreme court, rules XXIX., XXX.

SECT. 21. Simply reading the notice to the person to be notified is not sufficient. *Young v. Capen*, 7 Met. 289.

It must appear that notice was properly served, and, if not, the appearance, under protest, of the party notified will not waive his rights. *Hunt v. Lowell Gas-Light Co.*, 1 Allen 343.

SECT. 23. "*The truth,*" &c. It seems that this exact language must be used. *Bacon v. Rogers*, 8 Allen 146.

SECT. 25. If the certificate makes no reference to these provisions, it seems that it will still be presumed that they have been complied with, especially if the party objecting to the deposition was present when it was taken. *Brown v. King*, 5 Met. 173, 182.

SECT. 26. If the certificate provided for in this section does not show that the positive requirements of the law regarding the time and manner of taking the deposition have been complied with, the deposition will not be admissible in evidence, if objected to by the opposite party. For instance, where the certificate omits to state that the witness was sworn to tell the truth, &c., "relating to the cause for which the deposition is taken." *Simpson v. Carleton*, 1 Allen 109, 116.

But such omission in the certificate may, by leave of court, be corrected by the magistrate, even at the time when the deposition is offered in evidence at the trial of the case. *Hitchins v. Ellis*, 1 Allen 475. But as to depositions taken out of the state, the rule is less strict. See section 37, and the notes thereon.

An objection to the form is not waived by the presence of the adverse party at the taking of the deposition without then making the objection. *Bacon v. Rogers*, 8 Allen 146. See also *Hale v. Silloway*, 3 Allen 358.

"*The reason for taking it.*" The statement of a sufficient reason in the certificate will be *primâ facie* proof of its existence, and will, unless controlled by other evidence, render the deposition admissible. *Littlehale v. Dix*, 11 Cush. 364.

The following form of a certificate to be annexed to a deposition conforms to the requirements of the statutes : —

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

This is to certify that E. F., the above-named deponent, appeared before me at eleven A.M., on the 3d day of January, A.D. 1869, at my office, at No. 19 Court Street, in Boston in said Commonwealth, and gave his deposition

as above; — that prior to his examination the said deponent was duly sworn by me to testify [or, having satisfied me that he had conscientious scruples against taking an oath, solemnly and sincerely affirmed before me, under the pains and penalties of perjury, that he would testify] the truth, the whole truth, and nothing but the truth, relating to the said action between A. B. and C. D.; — that both parties had an opportunity to examine the said deponent as in the statute provided; — that the said deposition was reduced to writing by me [or, by the said deponent, or, by a disinterested person in my presence and under my direction]; — that it was carefully read to [or, by] the said deponent, and was then subscribed by him; — that the said deposition was taken at the request of the plaintiff in said action, the said deponent being about to go out of the State and not to return in time for the trial [or, living more than thirty miles from the place of trial, or, being so sick (or, infirm, or, aged) as to make it probable that he will not be able to attend the trial]; — and that the defendant in said action attended (by his attorney) [or, and that the defendant in said action was by me verbally notified at 10 A.M., on the 2d day of January, 1868, to appear at the time and place at which this deposition was taken, to put such interrogatories as he should think fit, (or, was duly notified of the time and place appointed for taking the deposition as the officer's return hereto annexed will show, — or, did (by his attorney) in writing waive his right to notice, as will appear by the paper hereto annexed) but did not attend either in person or by his attorney.]

Dated at Boston this 3d day of January, 1869.

X. Y., *Justice of the Peace.*

The original form of a certificate to be annexed to a deposition will be found in St. 1797, c. 35, s. 3. For remarks on the necessity of certain parts of the certificate, see notes on section 42 of this chapter.

The statute also requires the justice to certify on the deposition his own fees and those of the deponent. Gen. St. c. 157, s. 2. The following certificate will serve to show the different items: —

*Certificate of Fees.*

<i>Magistrate's fees.</i> Notice to defendant, \$0.20. — Subpœna to deponent, \$0.10. — Services, \$10.00 . . . . .	\$10	30
<i>Deponent's fees.</i> Travel, two miles, \$0.08. — Attendance, one day, \$0.50 . . . . .		58
Total . . . . .	\$10	88

Taxed by

X. Y., *Justice of the Peace.*



The strictly legal fees for the services of a magistrate are only fifty cents for taking a deposition, and twelve cents a page for writing the deposition and caption. See Gen. St. c. 157, s. 2.

As to the fees of commissioners to take depositions in other states, see St. 1862, c. 76.

SECT. 27. The certificate of the clerk of a court of record, that a deposition has been opened and filed by him, is *prima facie* evidence that it was duly sealed up and directed in conformity with the requirements of this section. *Rodn v. Hapgood*, 8 Gray 394.

SECT. 28. "*Sufficient cause.*" It will be deemed a sufficient cause, if the constable certifies that he cannot find the witness. *Kinney v. Berran*, 6 Cush. 394.

SECT. 29. "*Objections to any interrogatory.*" That is, objections to the *form* of the interrogatory. *Potter v. Tyler*, 2 Met. 58, 64. — *Potter v. Leeds*, 1 Pick. 309, 313. But objections to the competency of the witness, or to the admissibility of his answers, may be first made at the trial. *Atlantic Mut. Fire Ins. Co. v. Fitzpatrick*, 2 Gray 279, 280. — *Palmer v. Crook*, 7 Gray 418. — *Talbot v. Clark*, 8 Pick. 51, 56. — *Heywood v. Reed*, 4 Gray 574, 579. The party objecting must specify the *ground* of his objection, in order that the adverse party may have an opportunity to vary his interrogatory. *Allen v. Babcock*, 15 Pick. 56. It seems that no decision as to the validity of the objection can be obtained until the deposition is offered in evidence. *Anon.*, 2 Pick. 165.

SECT. 30. A similar rule applies when a suit is removed to a higher court by appeal. *Steele v. Carson*, 22 Pick. 309.

SECT. 31. "*The time and manner of opening, filing, and safe-keeping of depositions.*" See law rules of supreme court, rule v. — Rules of superior court, rule x. — Rules of municipal court of the city of Boston, rules XIX., XXIII.

For further rules under this section, see the notes on section 26 in this chapter.

SECT. 34. "*One or more competent persons.*" As to what persons are competent, see law rules of supreme court, rule vi. — Equity rules of supreme court, rule xxix. — Rules of the superior court, rule vi. — Rules of the municipal court of the city of Boston, rule xxi.

Several depositions may be taken under the same commission and on one set of interrogatories. *Howe v. Pierson*, 12 Gray 26.

The affidavit or deposition of a person in the military or naval service of the United States may be taken by the colonel, &c. St. 1862, c. 219. — St. 1863, c. 41, s. 1, 3, 5. — St. 1864, c. 262.

The following is the form of commission used by the superior court : —

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

*To any Commissioner appointed by the Governor of said Commonwealth of Massachusetts, or to any Justice of the Peace, Notary Public, or other Officer, legally empowered to take Depositions or Affidavits in Chicago, in the State of Illinois, greeting :*

[SEAL OF COURT.]

Assured of your prudence and fidelity, we do by these presents appoint and empower you to take the deposition of E. F., of said Chicago, merchant, to be used in a suit now pending in our Superior Court, between A. B. of Boston in said Commonwealth as plaintiff, and C. D., of said Boston, as defendant; and on certain days, to be by you appointed, to cause the deponent to come before you, and him carefully examine on oath or affirmation, in answer to the interrogatories hereunto annexed; and reduce the examination, or cause the same to be reduced to writing in your presence; and after such deposition shall thus be reduced to writing, it shall be carefully read to or by the deponent and shall then be subscribed by him.

You shall permit neither party to attend at the taking of the deposition, either himself, or by any attorney or agent, nor to communicate by interrogatories or suggestions with the deponent whilst giving his deposition in answer to the interrogatories annexed to this commission. And you shall take such deposition in a place separate and apart from all other persons, and permit no person to be present during such examination, except the deponent and yourself, and such disinterested person [if any] as you may think fit to appoint as a clerk, to assist you in reducing the deposition to writing. And you shall put the several interrogatories and cross-interrogatories to the

deponent in their order, and take the answer of the deponent to each fully and clearly, before proceeding to the next, and not read to the deponent nor permit the deponent to read a succeeding interrogatory, until the answer to the preceding has been fully taken down.

Of this our writ, with your doings by warrant of the same, you will make return under seal into our said Court, with all convenient expedition.

Witness the Honorable Lincoln F. Brigham, Chief Justice of our said court, and the seal thereof, at our city of Boston, on this first day of October, in the year of our Lord one thousand eight hundred and sixty-nine.

JOS. A. WILLARD, *Clerk*.

See the notes on sections 26 and 29 of this chapter.

SECT. 36. "*Rules \* \* \* as to the issuing of commissions, \* \* \* filing of interrogatories.*" See law rules of supreme court, rule VI. — Equity rules of supreme court, rules XXIX., XXX. — Rules of superior court, rule VI. — Rules of municipal court of the city of Boston, rule XXI.

"*All other matters relating to depositions taken out of the state.*" As to the manner of taking depositions, see law rules of supreme court, rule VII.; equity rules of supreme court, rule XXX. — Rules of the superior court, rule VII. — Rules of the municipal court of the City of Boston, rules XX., XXII.

As to objections to the authority of the person taking the deposition, when taken under a commission, and when not, see law rules of supreme court, rule VI. — Rules of the superior court, rule VI. — Rules of the municipal court of the city of Boston, rule XXI.

If the deposition is taken out of the state, and not under a commission, it must appear that the adverse party had sufficient notice and opportunity to examine the witness, or that from the circumstances it was impossible to give him such notice. Law rules of supreme court, rule VI. — Rules of the superior court, rule VI. — Rules of the municipal court of the city of Boston, rule XXI.

An action will not be postponed or continued to await the return of a commission, if it appears that there has been any negligence to apply for or transmit the same, whether

in term time or in vacation. Rules of the superior court, rule VIII.

For rules as to the time and manner of opening, filing, and safe-keeping of depositions, see law rules of supreme court, rule v. — Rules of the superior court, rule x. — Rules of the municipal court of the city of Boston, rule XIX., XXIII.

For rules in regard to taking depositions in equity, see equity rules of supreme court, rules XXIX., XXX.

SECT. 37. "*Depositions and affidavits taken out of the state in any other manner than is prescribed in the three preceding sections.*" This provision applies to depositions taken out of the state in the ways named in section 34, but without full compliance with all the formalities required by the statutes and rules of court, and such depositions may be admitted or rejected in the discretion of the court. *Tyng v. Thayer*, 8 Allen 391, 397. — *Stiles v. Allen*, 5 Allen 320. — *Reed v. Boardman*, 20 Pick. 441, 443. — *Amherst Bank v. Root*, 2 Met. 522, 532. — *Savage v. Birkhead*, 20 Pick. 172. — *Davis v. Allen*, 14 Pick. 313. — *Sabine v. Strong*, 6 Met. 270, 278. — *Stearns v. Kellogg*, 1 Cush. 449. — *Quinley v. Atkins*, 9 Gray 370.

"*May be admitted or rejected at the discretion of the court.*" In the exercise of this discretion, depositions have been admitted in the following cases. When the certificate did not show that the oath was properly administered. *Stiles v. Allen*, 5 Allen 320. Where the certificate stated that the deponent swore to the truth of the deposition, though it did not state that he was sworn previous to his examination. *Quinley v. Atkins*, 9 Gray 370. Where the certificate did not show that the formalities required by the rules of court relative to the taking of depositions on commission were complied with. *Reed v. Boardman*, 20 Pick. 441. — *Amherst Bank v. Root*, 2 Met. 522, 532. Where the certificate stated that the directions had been complied with, but it appeared probable from some of the answers that certain interrogatories had been read be-

fore the previous ones had been answered. *Sabine v. Strong*, 6 Met. 270, 278.

But in the following cases the deposition has been rejected. Where it was returned unaccompanied by the commission and the interrogatories. *Woods v. Clark*, 24 Pick. 35, 41. Where it did not appear that the interrogatories annexed were propounded, or that the deposition was taken in pursuance of the commission. *Davis v. Allen*, 14 Pick. 313.

The omission of the witness to answer some of the interrogatories may or may not, according to circumstances, be a sufficient reason for rejecting the deposition. *Savage v. Birckhead*, 20 Pick. 167.

No exception lies to the decision of the court in the exercise of its discretion in this matter. *Stiles v. Allen*, 5 Allen, 320. — *Woods v. Clark*, 24 Pick. 35, 41.

“*Sufficient notice of the taking thereof*,” &c. For a case in which an affidavit was rejected, because it did not appear that the adverse party had such notice, or that it was impossible to give him such notice, see *Stearns v. Kellogg*, 1 Cush. 449.

SECT. 38. “*Before commissioners appointed under the authority of the state or government*,” &c. Under this head is included a commissioner specially appointed by a court of another state according to its laws. *Commonwealth v. Smith*, 11 Allen, 243, 250.

*Deposition to Perpetuate Testimony.*

SECT. 40. The following is a form of notice to be served on all persons interested:—

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK SS.

*To A. B., of Boston, in said Commonwealth, greeting:*

Whereas C. D., of said Boston, has duly requested us to take the deposition of E. F., in order to perpetuate his testimony in regard to \* \* \* you are hereby notified to appear before us at 11 A.M. on the third day of

January, A.D. 1868, in room No. 3, at No. 19 Court Street, in said Boston, being the time and place appointed for taking the said deposition, then and there to put such interrogatories as you think fit.

Dated at Boston, this second day of January, A.D. 1868.

V. W., *Justice of the Peace and Counsellor at Law.*  
X. Y., *Justice of the Peace.*

The following is a form of summons to the person whose deposition is to be taken : —

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

*To E. F., of Boston, in said commonwealth, greeting :*

Whereas C. D., of said Boston, has duly requested us to take your deposition, in order to perpetuate your testimony in regard to \* \* \* you are hereby required, in the name of the Commonwealth of Massachusetts, to appear before us at 11 A.M., on the third day of January, A.D. 1868, in room No. 3, at No. 19 Court Street, in said Boston, being the time and place appointed for taking the said deposition, then and there to testify what you know relating to the said matter.

Hereof fail not, as you will answer your default under the pains and penalty in the law in that behalf made and provided.

Dated at Boston, this second day of January, A.D. 1868.

V. W., *Justice of the Peace and Counsellor at Law.*  
X. Y., *Justice of the Peace.*

SECT. 42. The following is a form of a certificate to be annexed to a deposition to perpetuate testimony : —

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

This is to certify that E. F., the above named deponent, appeared before us at 11 A.M., on the third day of January, A.D. 1868, in room No. 3, at No. 19 Court Street, in Boston, in said Commonwealth, and gave his deposition as above; that prior to his examination the said deponent was duly sworn before us to testify [*or, having satisfied us that he had conscientious scruples against taking an oath, solemnly and sincerely affirmed before us under the pains and penalties of perjury that he would testify*] the truth, the whole truth, and nothing but the truth relating to \* \* \* \* \* ; that all the parties interested had an opportunity to examine the said deponent as in the statute provided; that the said deposition was reduced to writing by us [*or, by one of us; or, by the said deponent; or, by a disin-*

terested person in our presence and under our direction]; that it was carefully read to [or, by] the said deponent, and was then subscribed by him; that the said deposition was taken at the request of C. D., in order to perpetuate the testimony therein contained; and that A. B., E. F., and G. H. were duly notified to appear at the time and place at which this deposition was taken, but that only A. B. and E. F. were present.

Dated, at Boston, this third day of January, A.D. 1868.

V. W., *Justice of the Peace and Counsellor at Law.*

X. Y., *Justice of the Peace.*

For an old form of the above certificate see St. 1797, c. 35, s. 8.

It seems that it is not necessary in the above certificate to state that the deposition was written by the deponent, or by the justices, or by either of them, or by any other person by their direction, or that it was read to or by the deponent; and, in general, every reasonable presumption is to be made in favor of admitting in evidence a deposition to perpetuate the testimony of a witness, especially where the counsel of the party objecting to the admission was present at the examination of the witness. *Brown v. King*, 5 Met. 173, 182.

For a copy of a certificate which was admitted, see *Brown v. King*, 5 Met. 176.

A certificate of fees similar to that given in the notes on Gen. St. c. 131, s. 26, should also be annexed to a deposition to perpetuate testimony. Gen. St. c. 157, s. 2.

SECT. 44. A deposition to perpetuate testimony can be used only by the party at whose request it was taken, or by those legally claiming under him, and only against those duly notified. *Welles v. Fish*, 3 Pick. 74, 80.

SECT. 53. See Anonymous, 3 Pick. 14.

*Evidence in Proceedings in Equity.*

SECT. 60. This section so far modifies the 27th rule in chancery of the supreme court, that a commission to take testimony in an equity cause may issue even after the expiration of four months from the filing of the replication. *Pingree v. Coffin*, 12 Cush. 600.

*Proof of Statutes and Laws.*

SECT. 61. If a court is abolished, and its records, proceedings, and jurisdiction transferred to another, the judge of the substituted court and the clerk to whom the records are transferred are the proper certifying officers. *Capen v. Emery*, 5 Met. 436, 438.

The record of a case need not show all the proceedings in detail; it is enough if it shows the subject-matter of the suit, the jurisdiction of the court over the parties, and its final judgment. *Knapp v. Abell*, 10 Allen 485, 488.

SECT. 63. "*Statute laws.*" A printed copy containing only the laws passed at a single session of the legislature, if purporting, &c., is admissible. *Ashley v. Root*, 4 Allen 504.

"*If purporting to be published under the authority of the respective governments.*" A volume of laws, upon the title-page of which were printed the words "By authority," was held to purport to have been published under the authority of the government. *Merrifield v. Robbins*, 8 Gray 150. See also *Barrett v. Mead*, 10 Allen 339.

A statute of another state, or its repeal, cannot be proved by parol evidence. *Raynham v. Canton*, 3 Pick. 293.

SECT. 64. "*Proved as facts.*" The common law of any other of the United States, or of the territories, cannot be taken notice of by the court, until so proved, and therefore the reports of other states cannot first be cited before the full bench to prove what the law of such state is. *Knapp v. Abell*, 10 Allen 485. — *Penobscot & Kennebec R.R. Co. v. Bartlett*, 12 Gray 244, 248. See *Cragin v. Lamkin*, 7 Allen 395.

SECT. 65. "*Proved as facts.*" See notes on the preceding section.

ADDITIONAL. Act making copies of books, records, &c., in the executive and other departments of the state government admissible as evidence. St. 1867, c. 213.



## CHAPTER CXXXII.

## OF JURIES.

*Qualification and Exemption.*

SECT. 2. The court refused to set aside the verdict in a case where one of the jurors was more than sixty-five years old, and this fact was not known to the party objecting until after the verdict was returned. Persons of that age are not absolutely disqualified from serving as jurors, but are only exempted, at their own election, from serving, and made liable to exception by either party when the jury is empanelled. *Munroe v. Brigham*, 19 Pick. 368. See also notes to section 7.

Superintendents, officers, and assistants employed in or about either of the state hospitals, state almshouses, jails, lunatic hospitals, houses of correction, houses of industry, reform schools, or the state prison, keepers of light-houses, conductors, and engine-drivers of railroad trains, and teachers of public schools, are also exempt from serving as jurors. St. 1864, c. 215.

SECT. 3. "*In any court.*" One who has served as a juror in the courts of the United States within three years, is not liable to be drawn and to serve as a juror in any of the state courts. Case of William Swan, 16 Mass. 220.

"*Three years.*" As to whether the three years is to be computed from the time of being drawn, or from the time of service, see *Ex parte William Brown*, 8 Pick. 504. See also section 17 of this chapter.

*Jury List and Box.*

SECT. 7. In a case where a list of persons to serve as jurors was prepared and laid before a town by its selectmen, and the town voted that said list be not accepted, and also voted to elect a list by nomination, and thereupon several persons, part of whom were on the list prepared by the selectmen and part not on that list, were nominated and declared chosen, it was

held that these persons were legally selected as jurors. Page *v. Danvers*, 7 Met. 326.

A verdict will not be set aside upon motion of the losing party, merely on the ground that some of the jurors were irregularly selected, although the party objecting did not know of such irregularity before the verdict was returned. Page *v. Danvers*, 7 Met. 326.

*Drawing and Summoning Jurors.*

SECT. 20. "*The constable shall summon,*" &c. It is not necessary that notice to jurors, who are drawn to assess damages caused by the laying out of a highway or railroad, should be served by a constable. Such notice may be served by the officer to whom the warrant for summoning a jury is directed. *Wyman v. Lexington & West Cambridge R.R. Co.*, 13 Met. 316, 325. See also Gen. St. c. 63, s. 22, and also Gen. St. c. 43, s. 27.

*Empanelling and other Provisions respecting Juries.*

*Challenging of jurors.* Either party in a civil suit may challenge peremptorily two jurors. St. 1862, c. 84.

As to the right of challenge in criminal cases, see chapter 172, ss. 3, 4, and notes to the same.

SECT. 26. There is no positive rule of law which requires the names of the jurors who find a defendant guilty on an indictment, to be inserted in the record of each particular case. *Turns v. Commonwealth*, 6 Met. 224, 235.

SECT. 28. "*Such as are qualified and liable to be drawn as jurors.*" If they are not so qualified and liable, objection must be taken before they are placed on the panel. *Commonwealth v. Gee*, 6 Cush. 174.

SECT. 29. "*Whether he is related to either party,*" &c. The examination of jurors, further than is provided in this section, with a view to ascertain whether they stand indifferent in the cause, is a matter wholly within the discretion of the judge, both as to putting additional questions, and the manner of putting them, whether by the judge or the party. *Commonwealth*

*v. Gee*, 6 Cush. 174. A juror returned to try an indictment is not to be asked whether he thinks that the crime set forth ought to be punishable by law, or ought to receive a different punishment from that which the law prescribes, but he may be asked whether he has expressed or formed an opinion as to the general guilt or innocence of all concerned in the act. See *Commonwealth v. Buzzell*, 16 Pick. 153. Further, as to what are proper questions to be put to a juror, see *Commonwealth v. Abbott*, 13 Met. 120.

In a case where jurors were returned from the by-standers in a criminal case, it was held that it was not necessary that the indictment should be read to them before making the inquiries prescribed by this section, but that it was sufficient to state to them in general terms the offence charged, and the party to be tried therefor. *Commonwealth v. Gee*, 6 Cush. 174.

*"That the juror does not stand indifferent."* An opinion, formed by one called as a juror, not strong enough to lead him to prejudge the case, or to be likely to prevent a candid judgment on hearing the evidence, does not disqualify him. So also one who is opposed to capital punishment, and fears that his opinion may influence others of the jury, is, notwithstanding, competent to be sworn as a juror on a trial for murder, if he believes he can give an unbiased verdict. *Commonwealth v. Webster*, 5 Cush. 295.

SECT. 30. This section is no violation of article 29 of the Declaration of Rights, which secures to every citizen "the right to be tried by judges as free, impartial, and independent as the lot of humanity will admit." *Commonwealth v. Reed*, 1 Gray 472.

SECT. 31. *"If a party knows," &c.* The fact that a juror is interested, if known to the counsel before trial, although not known to his client until after verdict, furnishes no ground for granting the client a new trial. *Kent v. Charlestown*, 2 Gray 281.

In the trial of an action against an insurance company, it

appeared that the sheriff, who had returned a talesman to serve on the jury, was a stockholder in such company, and this circumstance was known to the junior counsel for the plaintiff soon after the trial began, but no objection was made till after the trial had proceeded for some time, and it was held that this was a waiver of any exception to the competency of such juror. *Orrok v. Commonwealth Insurance Co.*, 21 Pick. 456, 471.

SECT. 32. See *Amherst v. Hadley*, 1 Pick. 38. — Anonymous, 1 Pick. 196. — *Commonwealth v. Stowell*, 9 Met. 572.

A person who has been found guilty on the trial of an indictment is not entitled to a new trial on the ground that a juror was taken from the panel at the suggestion of the prosecuting officer, and on the erroneous supposition that there was good cause to challenge him, if the defendant did not object to the same. *Commonwealth v. Stowell*, 9 Met. 572, 576.

As to the case of grand jurors, see *Commonwealth v. Parker*, 2 Pick. 550, 561.

SECT. 38. In the case of a sheriff's jury assessing damages to land, sustained by reason of the laying out of a highway, it was held that their verdict could not be set aside for the reason that a deputy sheriff, who had charge of them while they were deliberating on their verdict at the house of the petitioner where the hearing was had, upon their request for refreshments, furnished to them a pitcher of cider, belonging to, but without the knowledge of, the petitioner, if no injury to the respondents was caused thereby. *Tripp v. County Commissioners of Bristol*, 2 Allen 556.

SECT. 34. "*They shall not be sent out again without their own consent*," &c. When a jury, after deliberation, returned into court without agreeing on a verdict, it was held that there was no ground of exception, if the judge refused to instruct them that, if they should return into court a second time without having agreed on a verdict, they could not be sent out again without their own consent, unless they should request some further explanation of the law. *Foote v. Foote*, 13 Allen 411.

## CHAPTER CXXXIII.

## OF JUDGMENT AND EXECUTION.

*Entering Judgment; Awarding and Issuing Execution.*

SECT. 1. As to the entry of judgments in the supreme court in actions continued nisi, see Gen. St. c. 112, s. 31.

SECT. 5. "*Notwithstanding it is found that all the defendants are not jointly liable thereon.*" In such case it is not necessary to amend the declaration. *Wiggin v. Lewis*, 12 Cush. 486.

In an action brought against several defendants on several promissory notes, in which action the jury found a verdict against all of the defendants on some of the notes, and against only one of the defendants on one of the notes, it was held that separate judgments according to the finding of the jury could not be entered, but that the plaintiff must elect whether to take judgment against all of the defendants for the amount of the notes on which they were found jointly liable, or against only one of the defendants for the amount of the note on which he alone was found liable, and that the plaintiff must amend his declaration accordingly, paying costs on the counts struck out. See *Leonard v. Robbins*, 13 Allen 217, 219.

SECT. 7. "*When a motion for a new trial.*" The words "motion for a new trial" are not used here in a strict technical sense, but are intended to include all cases which are continued on the motion of a dissatisfied party with a view to obtain some new disposition thereof in order to relieve such party from a verdict. *Springfield v. Worcester*, 2 Cush. 61.

SECT. 8. See "*Joannes*" *v. Pangborn*, 6 Allen 243, cited in notes on Gen. St. c. 156, s. 5.

SECT. 9. "*Judgment shall be entered,*" &c. In a case where judgment was not entered for the penal sum, but for a specific sum assessed as damages, it was held that such judgment was nevertheless conclusive as to all past damages for violating the condition of the bond. *Goodrich v. Gale*, 97 Mass. 15, 17.

In certain cases the court have entered judgment for the penal sum, together with interest from the date of the breach. *Bank of Brighton v. Smith*, 12 Allen 243. — *Leighton v. Brown*, 98 Mass. 515.

SECT. 10. "*Execution for so much of the penal sum,*" &c. The plaintiff is not entitled to execution for the amount of such penal sum, nor for the amount of the ad damnum in his writ, merely because the defendant offers no evidence to show that a less sum is due and payable in equity and good conscience; but it is incumbent on the plaintiff to show how much of the penal sum is thus due and payable to him. *Austin v. Moore*, 7 Met. 116, 124.

On a hearing to ascertain the amount due and payable in equity and good conscience, the defendant may prove any payment on the bond, although not set up in his answer. *Merrill v. McIntire*, 13 Gray 157, 167.

SECT. 15. Sunday is to be excluded in computing the twenty-four hours. If an execution is issued within the twenty-four hours, the levy thereon will be void. *Penniman v. Cole*, 8 Met. 496.

SECT. 18. In the cases provided for by this section, as the creditor had no remedy at the common law, scire facias is the only remedy. This remedy cannot be availed of in an action on a judgment rendered in another state. *Arnold v. Roraback*, 8 Allen 429, 430.

SECT. 20. As to the form of executions, see *Dodge v. Doane*, 3 Cush. 460. See also notes on section 26.

"*And for other sufficient reasons.*" Where a discharge under the bankrupt act of 1841 was relied on as a bar to an action on a demand secured by attachment made before proceedings in bankruptcy were instituted against the defendant, it was held that the plaintiff might have a special judgment rendered, and an execution awarded against the attached property only. *Davenport v. Tilton*, 10 Met. 320, 330.

SECT. 22. "*In sixty days.*" An execution may be returned

at any reasonable and convenient time on the sixtieth day. *Adams v. Cummiskey*, 4 Cush. 420. — *Bull v. Clarke*, 2 Met. 587, 590.

*Set-off of Executions.*

SECT. 25. *First Clause.* Where one recovered a judgment for costs against an administrator, who had already in the same capacity recovered a judgment against him, it was held that the administrator might require one execution to be set off against the other, although on the execution against the administrator, being for costs only, he was personally liable. *Jones v. Carpenter*, 9 Met. 509, 511.

*Second Clause.* “*Was lawfully and in good faith assigned.*” The officer cannot justify a refusal to set off one execution against another, by making a return that he had due notice of an assignment of the first execution at the time when it was put into his hands, and therefore could not set off one against the other. To justify the officer in refusing to make the set-off, it must appear, by his return or otherwise, that the execution first delivered to him had been lawfully and in good faith assigned to another person before the creditor in the second execution became entitled to the sum due thereon. *Porter v. Leach*, 13 Met. 482.

*Fifth Clause.* “*For his fees.*” The statute does not extend to counsel fees, but only to taxable costs. *Ocean Insurance Co. v. Rider*, 22 Pick. 210. See *Dunklee v. Locke*, 13 Mass. 525, 527.

*Levy of Executions, and Personal Property exempt therefrom.*

SECT. 26. A levy on land may, without taking out an alias execution, be made for a balance left unsatisfied after a levy on goods and chattels, and vice versa. So a judgment debtor, whose property has been levied on, and the execution thereby satisfied in part, may afterwards be committed to prison on the same execution to satisfy the balance; but if he is committed on execution before any of his property is levied on, the execu-

tion by the common law was considered as satisfied, and could not afterwards be levied on the property. *Dodge v. Doane*, 3 Cush. 460, 468. See also Gen. St. c. 124, s. 5. — *Lyman v. Lyman*, 11 Mass. 817. It is however provided by statute, that when a person committed on execution is discharged on taking the poor debtor's oath, the judgment shall remain in full force against his estate, and the creditor may take out a new execution against his goods and estate, as if he had not been committed. Gen. St. c. 124, s. 22.

SECT. 29. A boat, cable, and anchor, appurtenant to a vessel, may be attached or taken on execution while the vessel is lying at the wharf, and while such appurtenances are not necessary to her safety. *Briggs v. Strange*, 17 Mass. 405.

Intoxicating liquors are not liable to be taken on execution, because the sale of them on execution would, under St. 1869, c. 415, s. 30, be unlawful. *Ingalls v. Baker*, 13 Allen 449.

Private papers, account-books, checks, and other choses in action, except bank-notes, &c., as provided in Gen. St. c. 133, s. 31, cannot be taken on execution. *Oystead v. Shed*, 12 Mass. 506. — *Maine Insurance Co. v. Weeks*, 7 Mass. 438. — *Perry v. Coates*, 9 Mass. 537. — *Bowman v. Wood*, 15 Mass. 534. — *Lane v. Felt*, 7 Gray 491.

SECT. 32. The provisions of this section in regard to exemptions "are manifestly intended, as in the very nature of things they could only be, for the relief and benefit of persons possessed of very little property, and dependent for subsistence upon daily labor or the moderate income derived from their usual and ordinary avocations." They should therefore be so interpreted as most effectually to carry out this plain and obvious purpose of the legislature. *Caswell v. Keith*, 12 Gray 351, 354. — *Danforth v. Woodward*, 10 Pick. 423, 428.

*First Clause.* "Necessary wearing apparel." Cloth and trimmings put in the hands of a tailor by the debtor, to be



made into clothes necessary for him, are exempt under this clause. *Richardson v. Buswell*, 10 Met. 506.

*"One bedstead," &c.* As to the interpretation of this clause in case the debtor has no wife or children, but has persons boarding with him, see *Brown v. Wait*, 19 Pick. 470.

*Second Clause.* *"Household furniture necessary for him," &c.* The exemption is not limited to things which are so absolutely indispensable that the debtor cannot live without them, but covers articles of household furniture so essential as to be regarded among the necessities, rather than among the luxuries of life. It was held, accordingly, that a sofa and two carpets of a plain and cheap character, which together with other furniture did not exceed \$100 in value, were exempt. *Davlin v. Stone*, 4 Cush. 359.

Under this clause a debtor is, under all circumstances, entitled to hold exempt from execution household furniture, of the class considered "necessary," to the full amount of \$100 in value, whether in his particular case that amount of furniture is necessary or not. *Mannan v. Merritt*, 11 Allen 582.

*Fourth Clause.* *"One cow."* A heifer, which has not begun to give milk, is exempt if the owner has no other. *Carruth v. Grassie*, 11 Gray 211. — *Johnson v. Babcock*, 8 Allen 583.

Where the debtor owned two cows, one mortgaged and the other not mortgaged, it was held that the officer had no right to seize on execution the cow which was not subject to a mortgage, since that would not be giving to the debtor the full benefit of the exemption contemplated by the statute. *Tryon v. Mansir*, 2 Allen 219.

*"One swine."* It makes no difference whether the animal is alive, or has been killed and dressed. *Gibson v. Jenney*, 15 Mass. 205.

*Fifth Clause.* The obvious design of this and the following clause was to secure to handicraftsmen the means by which they are accustomed to obtain subsistence in their respective

employments, and accordingly it has been held that no person engaged in and conducting any large and extended manufacturing operations, requiring the co-operation of many persons and a heavy outlay of expenditure, as for instance a paper-mill, can have the benefit of the exemptions herein provided for. *Howard v. Williams*, 2 Pick. 80, 83. — *Smith v. Gibbs*, 6 Gray 298. — *Wilson v. Elliot*, 7 Gray 69, 70. — *Caswell v. Keith*, 12 Gray 351, 354. While, however, these exemptions were not intended to apply to large manufacturing establishments, it has been held that they do apply to the case of a mechanic carrying on a small business, although he has in his employment several men who perform the principal part of the labor. *Daniels v. Hayward*, 5 Allen 43. It appears to be suggested in the case of *Goddard v. Chaffee*, 2 Allen 395, that no exemption would be allowed if the aggregate value of all the implements necessary to carry on the debtor's business exceeded \$100. On this point, see also *Dowling v. Clark*, 8 Allen 570. — *Eager v. Taylor*, 9 Allen 156. — *Stevenson v. White*, 5 Allen 148.

*"Tools, implements, and fixtures."* This exemption is not limited merely to such tools, &c., as are used by the debtor with his own hands, but covers also such tools and implements as are required by the journeymen and assistants, without whose aid he could not profitably prosecute his business. *Dowling v. Clark*, 1 Allen 283. — s. c. 3 Allen 570. — *Howard v. Williams*, 2 Pick. 80. — *Daniels v. Hayward*, 5 Allen 43.

The tools, implements, and fixtures must be of simple construction and of moderate expense. Thus it has been held, in the case of a printer, that his printing-press, forms, and types are not covered by the exemption. *Buckingham v. Billings*, 13 Mass. 82. — *Danforth v. Woodward*, 10 Pick. 423, 427. So it has been held that the carts and plough used on a farm are not exempt, but that the shovel, pickaxe, dung-fork, and hoe used by the debtor are tools and implements within the meaning of the statute. *Daily v. May*, 5 Mass. 313. — *Pierce*

*v. Gray*, 7 Gray 67. In the case of a milliner, it was held that a clock, stove, screen, pitcher, and table-cover might be considered as part of her tools and implements. *Woods v. Keyes*, 14 Allen 236. In the case of a debtor whose sole business was that of a musician, and who obtained most of his support by playing upon a violin, it was held that his violin and bow were implements necessary for carrying on his business. *Goddard v. Chaffee*, 2 Allen 395. A sewing-machine of less than \$100 in value, and necessary for carrying on the trade and business of the debtor, may be exempt from attachment, although the debtor owns another sewing-machine which is exempt under St. 1860, c. 65. *Rayner v. Whicher*, 6 Allen 292. — *Dowling v. Clark*, 1 Allen 283. — s. c. 3 Allen 570. If tools, implements, or fixtures, which are exempt, and are plainly distinguishable as articles which are exempt, are attached or taken on execution, the owner may maintain an action against the officer without first demanding the articles or pointing them out to him. If, however, the articles are so intermingled with the debtor's other property that the officer could not distinguish them, a neglect to claim them, when the officer was about to attach or levy upon the whole, might be a waiver. *Woods v. Keyes*, 14 Allen 236, 238.

*"Necessary for carrying on," &c.* The tools, &c., are "necessary," if without them the debtor's trade or business could not be carried on "successfully," or "in a convenient and usual manner." And it is a question for the jury in each case, whether the articles are necessary in the above sense. *Dowling v. Clark*, 3 Allen 570. — s. c. 1 Allen 283. — *Howard v. Williams*, 2 Pick. 80, 83. — *Woods v. Keyes*, 14 Allen 236. See also notes on the first clause of this section.

*"His trade or business."* "Business" is a word of large signification, and denotes the employment or occupation in which a person is engaged to procure a living. *Goddard v. Chaffee*, 2 Allen 395.

The exemption is not limited to the tools, &c., of a single trade. Thus, it was held in the case of one whose general business was the ice-business, and whose tools for that purpose were exempt, that he might also hold as exempt his tools for farming and gardening. *Pierce v. Gray*, 7 Gray 67. So also, where the debtor carried on the business of making, repairing, and painting carriages, and of making harnesses, it was held that his stock and materials for all these purposes, not exceeding \$100 in value, might be exempted. *Eager v. Taylor*, 9 Allen 156. — *Howard v. Williams*, 2 Pick. 80, 84.

The tools of a mechanic are not rendered liable to be taken on execution, by his temporarily suspending the exercise of his trade, provided he intends to resume it. *Caswell v. Keith*, 12 Gray 351.

*Sixth Clause.* “*Materials and stock,*” &c. As is evident from the wording of this clause, it applies to the same class of persons as the preceding, and does not embrace persons who are engaged merely in the business of buying and selling articles of merchandise. Thus it has been held, that the stock of a grocer, of a country shopkeeper, or of a pedler, is not exempt. *Reed v. Neale*, 10 Gray 242. — *Wilson v. Elliot*, 7 Gray 69. — *Gibson v. Gibbs*, 9 Gray 62. — *Smith v. Gibbs*, 6 Gray 298.

But the materials and stock designed and procured by a debtor for carrying on his trade, necessary for that purpose, and intended to be used therein, are not rendered liable to be seized on execution, by the fact that the debtor occasionally, when requested so to do, sells to a customer or to a stranger some of his stock, provided that he does not advertise or hold himself out as a vendor thereof. *Eager v. Taylor*, 9 Allen 156.

As to the effect of a sale of property, which would otherwise be exempt from attachment, when such sale is made by the debtor for the purpose of defrauding his creditors, see *Stevenson v. White*, 5 Allen 148. — *Rayner v. Whicher*, 6 Allen 292. — *Mannan v. Merritt*, 11 Allen 582.

The exemption may embrace materials and stock of more

than one trade or business. *Eager v. Taylor*, 9 Allen 156. See also notes on the fifth clause of this section.

*Seventh Clause.* Provisions procured and kept both for the purpose of sale and for the use of the debtor's family, and not set apart or claimed at the time of seizure to be held for the latter use, are not exempt. *Nash v. Farrington*, 4 Allen 157.

So also if a debtor, who has a larger quantity of any kind of provisions than the law exempts from attachment, sets apart no portion thereof for the use of his family, before it is attached, and makes no claim to any portion of it when the officer is about to attach the whole, he cannot maintain an action against the officer for seizing the whole. *Clapp v. Thomas*, 5 Allen 158.

*Additional exemptions.* "There shall be exempted one sewing-machine, of a value not exceeding \$100, in actual use by each debtor or family of the debtor." St., 1860, c. 65. See notes on the fifth clause of this section.

Also exempted, shares in co-operative associations organized under St. 1866, c. 290, to an amount not exceeding, in the aggregate, the par value of twenty dollars. St. 1867, c. 264.

SECT. 33. If the officer does not request the creditor to show him the debtor's goods, or to indemnify him, but agrees to execute the precept of the writ as well as he can, he will be answerable to the creditor for not attaching such goods as he might have found and attached, provided the creditor is injured by his neglect. *Bond v. Ward*, 7 Mass. 123.

*Sale, &c., of Goods taken on Execution.*

SECT. 34. As to the law prior to this provision, see *Davis v. Richmond*, 14 Mass. 473.

The share of a tenant in common in chattels may be taken and sold on an execution against him alone. *Hayden v. Binney*, 7 Gray 416.

SECT. 37. As to the law prior to this provision, see *Warren v. Leland*, 9 Mass. 265.

*Suspension of Levy.*

SECT. 50. "*Seized on execution.*" As to what constitutes a seizure on execution, see *Hall v. Crocker*, 3 Met. 245.

When, by reason of prior attachments, further service is suspended, the levy when completed takes effect, and the title to the estate vests in the judgment creditor, from the time of the seizure. *Hall v. Hoxie*, 3 Met. 251.

"*Any prior attachment.*" Any attachment, which might impair or defeat the effect of the levy, will be sufficient to justify the officer in suspending further service of the execution. *Wadsworth v. Williams*, 97 Mass. 339, 341.

When an equity of redemption was attached by different creditors at different times, a sale thereof on execution by the second attaching creditor, before the first recovered judgment, was held to be void as against all the others, and the third attaching creditor thereby obtained the rights to which the second would otherwise have been entitled. *Pease v. Bancroft*, 3 Met. 90.

*Death, &c., of Officer or Party after Commencement of Levy.*

SECT. 52. Prior to the enactment of this provision, in the case of a deputy sheriff who sold on execution an equity of redemption, and gave a deed to the purchaser, but died after the return day, without having entered on the execution his doings in relation to the sale, it was held that the sheriff under whom he acted might lawfully make a return of his deputy's doings, and that the purchaser of the equity had a valid title, notwithstanding the return was made after the return day. *Ingersoll v. Sawyer*, 2 Pick. 276.

SECT. 53. "*Or the service cannot be completed until after the return day.*" In such case the officer may date his return as of the day of the seizure, to which day all the after proceedings have relation. *Heywood v. Hildreth*, 9 Mass. 393. — *Hall v. Hoxie*, 3 Met. 251, 253.

*Recording of certain Executions.*

SECT. 55. If the execution is not recorded according to this section, it will not be good as against subsequent attaching creditors or purchasers in good faith for a valuable consideration. The provisions of this section apply to executions (under Gen. St. c. 140), in actions to foreclose mortgages. *Robbins v. Rice*, 7 Gray 202, 204.

*Penalty on Officer for not paying Money collected.*

SECT. 56. "*Any officer.*" A sheriff is answerable to a judgment creditor for the penalty imposed by this section, when his deputy refuses to pay over moneys received on execution, as well as when the sheriff himself refuses. *Esty v. Chandler*, 7 Mass. 464. See also Gen. St. c. 17, s. 51.

It was held that an officer did not incur the penalty by retaining money, collected by him on execution, during the time that the claims of different attaching creditors, or of attaching creditors and the assignees of a judgment debtor under St. 1838, c. 163, remained undetermined. *Bartlett v. Eveleth*, 4 Met. 149.

---

TITLE III.

## OF REMEDIES RELATING TO REAL PROPERTY.

---

CHAPTER CXXXIV.

## OF THE WRIT OF ENTRY, AND PETITIONS FOR THE SETTLEMENT OF TITLE.

SECT. 1. A writ of entry cannot be maintained against one who is not in possession, and who claims only a reversionary interest after the plaintiff's life-estate. *Kerley v. Kerley*, 13 Allen 286.

SECT. 2. The description, in the declaration, of the premises demanded "must be so certain that seisin may be delivered by the sheriff without reference to any description dehors the writ." *Riley v. Smith*, 9 Allen 370. — *Atwood v. Atwood*, 22 Pick. 283, 287.

It is not necessary that any damages, which the demandant may be entitled to recover under section 13, should be specifically demanded in the declaration. *Raymond v. Andrews*, 6 Cush. 265, 268.

In a writ of entry brought by an executor, the averment of his representative capacity is not essential. *Sheldon v. Smith*, 97 Mass. 34, 35.

SECT. 3. "*The demandant shall not be required to prove an actual entry,*" &c. This provision is not confined in its application to the ordinary case of a writ of entry against a disseisor, but extends to a writ of entry to enforce a forfeiture for breach of condition. *Stearns v. Harris*, 8 Allen 597, 598. — *Austin v. Cambridgeport Parish*, 21 Pick. 215, 224.

"*Unless the demandant has, at the time of commencing the same, a right of entry into the premises.*" By "*right of entry*" is not meant "the right of possession as between landlord and tenant for years, but the right to go upon the land for the purpose of regaining the seisin." *Brewer v. Stevens*, 18 Allen 346, 349, 350.

SECT. 5. The execution, delivery, and recording of a deed, *without any entry* by the grantee upon the granted premises, has been held to constitute a sufficient disseisin to enable the assignee in insolvency of the grantor to maintain a writ of entry against the grantee to test the validity of such deed. *Hill v. Andrews*, 12 Cush. 185, 186.

SECT. 6. With regard to the intention and effect of this section, see *Dolby v. Miller*, 2 Gray 135.

"*Or withheld from him the possession of the premises.*" As to what is necessary to constitute such withholding, see *Wheelwright v. Freeman*, 12 Met. 154, 156. — *Dolby v. Miller*, 2 Gray 135, 136.



SECT. 7. With regard to the necessity of an *actual* entry, see note to section 3.

As to the *recording of the execution* obtained in a writ of entry, see section 55 of chapter 133.

SECT. 8. With regard to the pleadings in a writ of entry, see Stearns on Real Actions, — also Jackson on Real Actions.

SECT. 9. "*Or any one may sue alone for his share.*" This does not apply to writs of entry to foreclose mortgages under chapter 140. *Webster v. Vandeventer*, 6 Gray 428, 430.

If a writ of entry be brought by two or more, and the right of one of the joint demandants to recover proves defective, the action must fail, unless the writ be amended by striking out such party before verdict. *Chandler v. Simmons*, 97 Mass. 508, 515.

SECT. 12. "*Shall be allowed such costs only as accrue after the filing of the plea.*" See *Esty v. Currier*, 98 Mass. 500, 503.

SECT. 13. A writ of seisin may issue before the assessment of damages, &c., but in such case the demandant shall give security, if the tenant has entered a claim for improvements. St. 1864, c. 802.

This section supersedes all previously existing remedies for the recovery of damages for rents and profits, or for waste, and when one has recovered judgment in a writ of entry, although such damages were not specifically demanded in the writ, he cannot subsequently maintain an action for their recovery. *Raymond v. Andrews*, 6 Cush. 265.

The demandant is entitled to recover damages under this section, even in cases where the tenant files a plea of disclaimer, and the demandant obtains a verdict on that issue. *Richards v. Randall*, 4 Gray 53, 57.

SECT. 18. "*If the demanded premises have been actually held and possessed by the tenant,*" &c. It seems that the original statute upon this subject (St. 1807, c. 75) was intended for the benefit of squatters on wild land without color of title. It was

afterwards, however, held to be broad enough to cover all cases in which persons held by a title which proved defective. See *Plimpton v. Plimpton*, 12 Cush. 458, 467. — *Bacon v. Callender*, 6 Mass. 303. — *Runey v. Edmands*, 15 Mass. 291, 294. — *Mason v. Richards*, 15 Pick. 141, 142. — *Newhall v. Saddler*, 17 Mass. 350.

The possession of the tenant, however, to enable him to recover under this section, must have been *adverse, and not in acknowledgment of or in subordination to the title of another, nor under any equitable title*. *Plimpton v. Plimpton*, 12 Cush. 458, 466. — *Knox v. Hook*, 12 Mass. 329, 331. — *Runey v. Edmands*, 15 Mass. 291, 295. — *Shaw v. Bradstreet*, 13 Mass. 241, 243. — *Mason v. Richards*, 15 Pick. 141. — *Larcom v. Cheever*, 16 Pick. 260, 263. — *Saunders v. Robinson*, 7 Met. 310, 314.

The fact that the tenant entered during the continuance of a life-estate, and that the demandant's title did not accrue until within six years before the commencement of his action, will not prevent the tenant from recovering for improvements under this section. *Heath v. Wells*, 5 Pick. 139, 144.

*"The value of any buildings or improvements made or erected on the premises," &c.* The tenant will not be entitled to compensation for improvements in raising the street and building a sidewalk *in front of* the premises, — nor for erecting a fence, which at the time of judgment has come to be of no value, — nor for taxes paid, — nor for *interest* on sums expended for improvements. *Curtis v. Gay*, 15 Gray 36.

SECT. 19. A claim for improvements cannot be maintained under this section against a mortgagee, or those claiming under him, in favor of a tenant who has possession of the land as owner of the equity. *Childs v. Dolan*, 5 Allen 319. — *Haven v. Adams*, 8 Allen 363, 368.

A tenant cannot recover under this section for improvements made *pendente lite*. *Haven v. Adams*, 8 Allen 363. — *Harris v. Marblehead*, 10 Gray 40, 44.

*"If he holds them under a title which he has reason to*

*believe good.*" As to what constitutes a sufficient reason for the tenant to believe his title good, see *Plimpton v. Plimpton*, 12 Cush. 458, 468. — *Saunders v. Robinson*, 7 Met. 310, 316. — *Baggot v. Fleming*, 10 Cush. 451, 453.

SECTS. 20, 21. If a suggestion of claim for improvements be not entered pursuant to these sections, the tenant will be deemed to have waived his claim. *Saunders v. Robinson*, 7 Met. 310, 315. — *Livermore v. Boutelle*, 11 Gray 217, 221. It seems, however, that even after verdict, the court *might*, in the exercise of its discretion, and to effect the ends of justice, grant a new trial, in order to allow the claim to be made. *Livermore v. Boutelle*, 11 Gray 217, 221.

SECT. 22. Unless the assessment of rents and profits is postponed pursuant to this section, it cannot be made subsequently to the verdict of the jury upon the title. *Judd v. Gibbs*, 8 Gray 435, 436.

SECT. 29. "*Except the tenant*," &c. But as against him, the remedy provided in this chapter supersedes all others. *Raymond v. Andrews*, 6 Cush. 265. See note to section 13.

SECT. 49. A petition under this section will not lie against a citizen of another state or of a foreign country. *Macomber v. Jaffray*, 4 Gray 82.

The assignee of an insolvent debtor cannot maintain a petition under this section against a prior mortgagee of the insolvent, to compel him to bring an action to test the validity of his mortgage. *Dewey v. Bulkley*, 1 Gray 416. — *Hill v. Andrews*, 12 Cush. 185.

"*Any person in possession of real property*," &c. It is only when the petitioner has *actual possession*, that he can have relief under this section; a mere constructive possession of flats over which the tide ebbs and flows will not be sufficient. *Monroe v. Ward*, 4 Allen 150.

## CHAPTER CXXXV.

### OF THE WRIT OF DOWER.

SECT. 4. Repealed and superseded by St. 1869, c. 418, ss. 1, 9, 10.

SECT. 7. Repealed and superseded by St. 1869, c. 418, ss. 2-8, 10.

## CHAPTER CXXXVI.

### OF THE PARTITION OF LANDS.

Provision for partition of lands held in common and belonging to any tribe of Indians. St. 1869, c. 463, s. 3.

For a case in which, thirteen years after a partition was made, the court refused to rectify an error in it, by which too much was given to one party and too little to others, see *Hathaway v. Thayer*, 8 Allen 421.

#### *In Courts of Common Law.*

Division lines of *flats* may be determined upon petition to the supreme court, proceedings on such petition to be according to sections 3-13, 15-24, 29, 32, 38, 39, 41, 44-47 of this chapter. St. 1864, c. 306. — St. 1867, c. 205.

SECT. 1. Process will not lie under this chapter to compel partition, before foreclosure, between mortgagees in possession under different simultaneous mortgages. *Ewer v. Hobbs*, 5 Met. 1.

Nor in favor of a judgment creditor, who has levied his execution upon an undivided interest in land of which the judgment debtor was not actually seised. *Newton Bank v. Hull*, 10 Allen 144.

Nor in any case in favor of a judgment creditor, who has levied his execution on an undivided interest in real estate,

until after the expiration of the year within which the judgment debtor may redeem. *Phelps v. Palmer*, 15 Gray 499.

If one tenant in common holds an assignment of a mortgage upon the whole estate, his co-tenants cannot maintain a process against him for partition under this chapter. *Blodgett v. Hildreth*, 8 Allen 186.

*"Persons holding lands," &c.* Buildings owned in common, but standing on land to which the petitioners claim no title, are not the subject of partition under this chapter. *Rice v. Free-land*, 12 Cush. 170.

SECT. 3. *"May be maintained by any person who has an estate in possession."* It was formerly held that where an estate was subject to a *lease for years*, tenants in common of the reversion could not maintain a petition for partition under this chapter. *Hunnewell v. Taylor*, 6 Cush. 472. But by St. 1853, c. 410, re-enacted in sections 67 and 68 of this chapter, it was provided that the existence of any lease should not affect the validity of any partition previously made, and that partitions might thereafter be made, notwithstanding any such lease.

Where one has a reversion, and also a life-estate in possession, which by reason of an intervening estate does not merge in the reversion, he cannot maintain a petition under this chapter. *Johnson v. Johnson*, 7 Allen 196, 198.

SECT. 6. As to the particularity with which the rights of parties interested must be set forth, see *Hazard v. Little*, 9 Allen 260, 262.

SECT. 26. *"May be set off to any one of the parties," &c.* As to the power of the commissioners to determine to which of the parties the whole estate shall be set off, see *King v. Reed*, 11 Gray 490.

SECT. 44. As to the rule regarding the taxation of costs, see *Dudley v. Adams*, 5 Allen 96.

SECT. 45. *"From and after the filing of the plea or answer."* The petitioner is not, in the case provided for in this section, to recover costs from the time mentioned *until the termination of*

*the case*, but only until the issue raised is disposed of by verdict of the jury or otherwise. *Powell v. Jenny*, 11 Allen 104, 105.

*In the Probate Court.*

"The probate court may make partition of lands held by joint tenants, coparceners, or tenants in common, when the shares of the respective parties are not in dispute between them, in like manner and by like proceedings," as in case of the "partition of the real estate of a person deceased among his heirs and devisees." St. 1869, c. 121, s. 1.

If partition be made in a probate court which has not properly jurisdiction of the settlement of the estate of the deceased, the partition will be void. *Sigourney v. Sibley*, 21 Pick. 101, 107.

SECT. 59. Although the charges and expenses of the commissioners have not been ascertained and allowed by the court, pursuant to this section, such fact will not prevent the commissioners from recovering their compensation from the parties employing them. *Potter v. Hazard*, 11 Allen 187, 192.

SECT. 51. The notice required by this section "may be dispensed with, when all persons interested signify, in writing, their assent to the partition, or waive notice." St. 1869, c. 121, s. 2.

SECT. 60. If there is no real uncertainty as to the legal rights of the parties, it is the duty of the court to make partition, although one of them should insist that there is a controversy between them. *Dearborn v. Preston*, 7 Allen 192.

If, when the court assumes jurisdiction, there is no dispute, and the shares do not seem to the judge to be uncertain, he must retain jurisdiction, although subsequently the shares do appear to him to be uncertain. *Potter v. Hazard*, 11 Allen 187, 191. See also section 70.

SECT. 62. The notice required by this section "may be dispensed with, when all persons interested signify, in writing, their assent to the partition, or waive notice." St. 1869, c. 121, s. 2.

SECT. 64. Where one had joined in a petition, representing that his wife was entitled to a share, although such share had previously become vested in him by mesne conveyances, it was held that the partition vested a valid title in her as against him and his heirs. *Carpenter v. Green*, 11 Allen 26.

A judgment for partition is conclusive evidence, as against the parties and their privies, that the land divided had been previously held by the parties as tenants in common. *Edson v. Munsell*, 12 Allen 600.

*General Provisions.*

SECT. 70. See *Potter v. Hazard*, 11 Allen 187, 191.

SECT. 74. See *Potter v. Hazard*, 11 Allen 187, 191.

## CHAPTER CXXXVII.

### OF FORCIBLE ENTRY AND DETAINER.

As to the authority, in this state, of English decisions upon the English statutes relative to forcible entry and detainer, see *Presbrey v. Presbrey*, 13 Allen 281, 285.

With regard to the mode of proceeding in this state in former years against lessees who held over beyond their terms, see *Jackson on Real Actions*, p. 241. Chapter on "Writs of Entry ad terminum qui præteriit."

For a general consideration of the origin and purpose of the provisions of this chapter, see opinion of SHAW, C. J., in *Howard v. Merriam*, 5 Cush. 563, 565.

SECT. 1. "*Shall not enter with force.*" "A mere unlawful entry into lands, though it would justify the common averment of *vi et armis*, or force and arms, is not the forcible entry contemplated by the statute. It must be something more, either an original entry or subsequent detainer with strong hand, and this may be by the use of actual force and violence, or by menace of force, accompanied by arms and a manifest intent to carry such threat into effect, or by a show of force calculated

to create terror and alarm, by an exhibition of arms, a display of numbers, or other means manifesting an open and visible determination forcibly to make the entry, or forcibly to resist the entry of another." Per SHAW, C. J., in *Saunders v. Robinson*, 5 Met. 343, 345. See also on this subject, *Benedict v. Hart*, 1 Cush. 487. — *Commonwealth v. Bigelow*, 3 Pick. 31. — *Commonwealth v. Dudley*, 10 Mass. 403, 409. — *Fifty Associates v. Howland*, 5 Cush. 214, 218.

Although a party entitled to the possession of premises is forbidden to enter by force without process of law, the party upon whom the forcible entry is made, cannot maintain, for the damages caused thereby, an action of tort corresponding to the old action of trespass *quare clausum fregit*. *Curtis v. Galvin*, 1 Allen 215. — *Moore v. Mason*, 1 Allen 406. — *Meador v. Stone*, 7 Met. 147. — *Sampson v. Henry*, 13 Pick. 36. And where the party entitled to possession has obtained peaceable possession of a portion of the premises, it has been held that he may, without becoming liable to an action for personal damages for assault and battery, use as much force, short of committing a breach of the peace, as may be necessary to overcome the tenant's resistance to his taking possession of the residue. *Mugford v. Richardson*, 6 Allen 76. — *Winter v. Stevens*, 9 Allen 526, 530.

SECT. 2. This and the following sections provide for the recovery of the possession of premises in three distinct classes of cases. *First*. Where one has made a *forcible entry* upon the lands of another. *Second*. Where one unlawfully *detains by force* a possession which he has acquired peaceably. *Third*. Where a lessee or tenant holds possession without right after the termination of his lease or tenancy. See opinion of SHAW, C. J., in *Howard v. Merriam*, 5 Cush. 563, 565–570. These three classes of cases will be considered in their order.

*First. Forcible entry.* It seems that if a party make a forcible entry, he will be liable to an action under this chapter, even though, at the time of such entry, he was the party lawfully



entitled to the possession. Blackstone says ( 4 Bl. Com. 148) that, under the English statutes relating to this subject, if the forcible entry be proved, "the justices shall make restitution by the sheriff of the possession, without inquiry into the merits of the title, for the force is the only thing to be tried, punished, and remedied by them." See, to the same effect, remarks of BIGELOW, C. J., in *Presbrey v. Presbrey*, 13 Allen 281, 284, 285.

Accordingly, it has been held that an action under this chapter may be maintained by one tenant in common against a co-tenant who has forcibly ejected him. *Presbrey v. Presbrey*, 13 Allen 281, 284, which overrules dictum in *King v. Dickerman*, 11 Gray 480, 481.

When premises are in the possession of a tenant, the landlord cannot maintain an action under this chapter against one who forcibly enters and expels the tenant. *Commonwealth v. Bigelow*, 3 Pick. 31.

A mere tenant at will may maintain such action against one who forcibly enters and ejects him. *Walker v. Sharpe*, 14 Allen 43.

*Second. Forcible detainer.* A purchaser at a sale under a power of sale mortgage may maintain an action under this chapter against the mortgagor, if he forcibly retains possession of the premises. *Kinsley v. Ames*, 2 Met. 29.

It seems that a tenant in common might maintain such action against a co-tenant who forcibly kept him out of possession. See *Presbrey v. Presbrey*, 13 Allen 281, 284.

A mortgagee in possession after an entry to foreclose may maintain such action against one who has entered in a peaceable manner, but without right, and afterwards holds possession by force. *Mitchell v. Shanley*, 15 Gray 319. It is to be noted however that, according to the dates stated in the report of the same case in 12 Gray 206, the plaintiff's title as mortgagee became absolute before his action was commenced.

*Third. Landlord and tenant process.* In order to main-

tain an action in the third class of cases it is necessary that the relation of lessor and lessee, or of landlord and tenant, should have subsisted between the plaintiff, or those under whom he claims, and the defendant, or those under whom he claims, and that the lease or tenancy previously subsisting should have been terminated.

Consequently, it has been held that such an action cannot be maintained against one who, although he has held the premises only as tenant, has held as tenant, not of the plaintiff or of any one through whom the plaintiff claims title, but of a stranger, who holds an adverse title. *Green v. Tourtellott*, 11 Cush. 227, 230.

But it has been repeatedly held that a grantee may maintain such action against one who has been the tenant of his grantor, though he has never held that relation to himself. *Hildreth v. Conant*, 10 Met. 298, 302. — *Hollis v. Pool*, 3 Met. 350. — *Howard v. Merriam*, 5 Cush. 563, 567, 583, 584. — *Hayden v. Ahearn*, 9 Gray 438. — *Rooney v. Keenan*, 6 Allen 74, 75.

There are certain cases in which a party, in possession of real estate under circumstances which in a certain sense may be said to constitute him a tenant at will, has been, nevertheless, held not to be liable to an action, as coming within the third class above mentioned.

Thus a mortgagee, who has entered for the purpose of foreclosure, cannot maintain such action against the mortgagor, although a mortgagor in possession is often said to hold as tenant at will of the mortgagee. *Gerrish v. Mason*, 4 Gray 432. — *Larned v. Clarke*, 8 Cush. 29, 31. — *Hastings v. Pratt*, 8 Cush. 121, 123. In the first of these cases any tenancy at will had been terminated by a fourteen days' notice to quit, and in the second case, by a written lease given by the mortgagee to the party by whom the suit was brought.

Nor can the grantee of an estate maintain such action to recover possession from one who originally entered under a bond for a deed from his grantor, but who has failed to per-

form the condition of his bond ; although one who is thus in under a contract for a sale is often said to be a tenant at will to the owner, and any such tenancy, if it existed, would have been terminated by the conveyance of the fee. *Dakin v. Allen*, 8 Cush. 33.

It is to be noted, however, that in none of the above-cited cases brought against a mortgagor, or a party having a bond for a deed, was any *forcible detainer* alleged, and it would seem that, if that element had existed in any of those cases, the action could have been maintained notwithstanding the legal relations of the parties to each other. See remarks of BIGELOW, C. J., in *Presbrey v. Presbrey*, 13 Allen 281, 284. See also *Kinsley v. Ames*, 2 Met. 29. — *Howard v. Howard*, 3 Met. 548.

The words "*or otherwise*" in this section do not appear in the corresponding section of the Revised Statutes. According to the Revised Statutes, the process against a lessee could be maintained only after his lease had been determined in one of two specified ways, i.e. either "by its own limitation or by a notice to quit," and in *Fifty Associates v. Howland*, 11 Met. 99, 101, it was accordingly held that the process would *not* lie against a lessee whose lease had been determined by an entry to enforce a forfeiture thereof for breach of a condition therein contained. The insertion of these two words, "*or otherwise*," in this section, seems, however, to have rendered the above-cited decision no longer applicable, and it would seem that there can be no doubt that an action might now be maintained under circumstances precisely similar to those of the above case of *Fifty Associates v. Howland*.

There are certain cases in which, even after a tenant's estate is determined, he will not be liable to an action under this chapter, until he has had notice of the facts which determine his tenancy. Thus, where a tenancy at will is determined by a conveyance in fee or a written lease given by his landlord, he will be entitled to notice of such conveyance or lease before an action for the possession of the premises can be commenced

against him. See *Furlong v. Leary*, 8 Cush. 409. — *Mizner v. Munroe*, 10 Gray 290. — *McFarland v. Chase*, 7 Gray 462. — *Pratt v. Farrar*, 10 Allen 519, 520. But if the tenancy is determined prior to the conveyance or lease, the tenant will not be entitled to such notice before action is brought. *Hildreth v. Conant*, 10 Met. 298, 302.

SECT. 4. "*Have been in quiet possession for three years,*" &c. It seems that a mere formal entry by the plaintiff, made for the purpose of foreclosing a mortgage held by him, will not be sufficient to interrupt such possession. *Mitchell v. Shanley*, 12 Gray 206.

SECT. 5. Actions under this section "shall be brought in the county where the premises are situated; but where any defendant resides in any other county, the writ may be served upon him personally, or by leaving a certified copy thereof at his last and usual place of abode." St. 1866, c. 47.

"*No other declaration shall be required.*" No allegation of any forcible entry or detainer, or of any holding over by a lessee after determination of his lease, is required. *Hastings v. Pratt*, 8 Cush. 121, 122.

SECT. 6. *Form of proceedings in actions under this chapter.* Under an answer denying that he holds the premises unlawfully and against the right of the plaintiff, the defendant may introduce evidence that he has been in quiet possession for three years. *Mitchell v. Shanley*, 12 Gray 206, 207.

A plea that the defendant "is not in possession of the premises demanded," is bad on general demurrer, and the plaintiff, if such plea be made, will be entitled to judgment on the merits. *Davis v. Allen* 12 Cush. 323.

Upon the death of the plaintiff in an action under this chapter, the action will abate, if the plaintiff's whole interest and title terminated with his life, as when he was a tenant for life or at will. *Ferris v. Kenney*, 10 Met. 294, 296. — *Brown v. Kendall*, 13 Gray 272. But if the plaintiff's interest did not terminate with his life, his heirs or devisees, or, in case he held

an estate for years, *it seems* his executor or administrator, may be admitted to prosecute the action. *Ferris v. Kenney*, 10 Met. 294, 296. — *Sacket v. Wheaton*, 17 Pick. 103. — Gen. St. c. 127, s. 13. In the above case of *Sacket v. Wheaton*, a *grantee* of a devisee of the original plaintiff was admitted to prosecute the action, but it is to be noted that this action arose under St. 1826, c. 70, which differs somewhat from the present statute, (Gen. St. c. 127, s. 13) above cited.

It seems that if, *pendente lite*, one of two plaintiffs conveys his interest in the premises to the other, such conveyance will not abate the action. *Coburn v. Palmer*, 8 Cush. 124.

It is no cause for abatement of an action under this chapter, that the estate of the plaintiff in the demanded premises has determined while the action is pending. *Casey v. King*, 98 Mass. 503, 504. — *King v. Lawson*, 98 Mass. 309. — *Blish v. Harlow*, 15 Gray 316, 319. — *Coburn v. Palmer*, 8 Cush. 124, 126.

It seems, however, that if the plaintiff's title determines while the action is pending, he will not be entitled to judgment for possession, even though he acquires a new title before judgment is entered. *Casey v. King*, 98 Mass. 503, 505, 506.

If, during the pendency of the action, the defendant removes from the premises, and the plaintiff takes possession of them, *quære*, whether this abates the action. It has been held that it does not, if not pleaded in abatement at the first term after such event. *Hayden v. Ahearn*, 9 Gray 438. — *Crosby v. Wentworth*, 7 Met. 10, 13. See also *Coburn v. Palmer*, 8 Cush. 124. — *Weston v. Spiller*, 2 Allen 125, 128. — *Gerrish v. Gary*, 1 Allen 213. — *Walcott v. Spencer*, 14 Mass. 409.

As to the right of the defendant in an action under this chapter to deny the title of the plaintiff, where the defendant has previously held as tenant of the plaintiff, see *Hogan v. Harley*, 8 Allen 525. — *Oakes v. Munroe*, 8 Cush. 282, 284. — *Towne v. Butterfield*, 97 Mass. 105. — 2 Greenl. Ev. s. 305.

SECT. 7. In a case in which the plaintiff had a good cause

of action when his action was commenced, but, his interest being that of a lessee for years, and his term having expired, was not entitled to possession at the time of entering judgment, it was held that he was entitled to his costs, and to such a judgment as would secure to him the benefit of the defendant's recognizance. *King v. Lawson*, 98 Mass. 309, 312. See also *Casey v. King*, 98 Mass. 503.

The above case of *King v. Lawson* was decided upon the authority of *Coburn v. Palmer*, 8 Cush. 124, 126, in which the plaintiff appears to have obtained judgment for *his costs*, when he was not entitled to any judgment for *possession*. By the original records of the court in that case, however, it appears that the judgment was that the plaintiffs recover of the defendant "possession of the premises demanded and costs of suit taxed at \$49.38," and that a writ of possession was subsequently issued.

SECT. 8. See *Brown v. Kendall*, 13 Gray 272, in which, the action having abated by the death of the plaintiff, it was decreed that it should be dismissed "without costs to either party."

SECT. 9. It seems that a recognizance under this section may be entered into for the defendant by his attorney in the case. *Adams v. Robinson*, 1 Pick. 461.

A recognizance under this section may be valid, although the language of its condition varies from the language of this section in immaterial particulars, or although material omissions be made, provided they are in favor of the defendant. *Shaw v. McIntier*, 5 Allen 423, 425.

With regard to the proper recording of the recognizance, see *Benedict v. Cutting*, 13 Met. 181, 186.

Upon a recognizance given under this section, the defendant, if judgment is finally rendered against him, will be liable, *primâ facie*, and in ordinary cases, to pay rent, at the rate reserved in the lease, until the time of the recovery of possession by the plaintiff, even though the buildings on the premises be

in the mean time destroyed by fire ; and will be also responsible for all waste, and even for the loss of the building by fire, if not proved to have been caused by inevitable accident. *Davis v. Alden*, 2 Gray 309, 312, 314. It follows from this case that the penal sum named in a recognizance under this section should always be large enough to cover the whole value of the destructible portion of the buildings on the premises demanded.

## CHAPTER CXXXVIII.

### OF WASTE AND TRESPASS ON REAL ESTATE.

SECT. 4. Although real actions of waste, if brought by tenants in common, must be brought by them separately, yet in an action of tort in the nature of waste under this section they must all join. *Bullock v. Hayward*, 10 Allen 460, 461.

SECT. 9. "*In an action of tort.*" This is the sole remedy. *Boston Iron Co. v. King*, 2 Cush. 401, 405.

SECT. 12. As to the time when the money must be brought into court, see *Warren v. Nichols*, 6 Met. 261, 267.

## CHAPTER CXXXIX.

### OF ACTIONS FOR PRIVATE NUISANCES.

SECT. 1. "*In an action of tort for a nuisance.*" As to what is such an action, see *Codman v. Evans*, 7 Allen 431.

For a case in which the court in its discretion refused to order the abatement of a nuisance, see *Bemis v. Clark*, 11 Pick. 452. It is to be noted, however, that when this action arose there was no statute provision authorizing the plaintiff to judgment for abatement, as of right, in a second suit.

## CHAPTER CXL.

## OF THE FORECLOSURE AND REDEMPTION OF MORTGAGES.

Upon the question whether a United States court might not decree a different foreclosure from that provided for in this chapter, see 1 Am. Law Rev. 27, 28.

*Possession and Foreclosure.*

SECT. 1. “*The mortgagee may recover possession of the mortgaged premises by action,*” &c. A mortgagee may maintain such action, even although he is already in possession of the mortgaged premises. *Merriam v. Merriam*, 6 Cush. 91. — *Mann v. Earle*, 4 Gray 299, 300. — *Devens v. Bower*, 6 Gray 126, 127. — Also section 11 of this chapter. And the commencement of such action will not be an abandonment of such previous possession. *Page v. Robinson*, 10 Cush. 99, 101. But where a mortgagee has made an entry to foreclose, and afterwards brings an action for the same purpose, an entry made under the judgment in such action will waive the prior entry so far as to prevent the three years from running from the time when such prior entry was made; and *it seems*, that the mere bringing of such action will have the same effect. *Fay v. Valentine*, 5 Pick. 418. — *Page v. Robinson*, 10 Cush. 99, 101.

A second mortgagee may maintain such action against one who holds the first mortgage and also the equity of redemption. *Kilborn v. Robbins*, 8 Allen 466, 472. — *Cronin v. Hazletine*, 3 Allen 324.

So also a second mortgagee may maintain such action against the mortgagor, although the first mortgagee has recovered a conditional judgment upon his mortgage, under which he holds possession. *Amidown v. Peck*, 11 Met. 467, 469.

So also a mortgagee of a remainder or reversion may main-



tain such action during the life of the tenant of the particular estate. *Penniman v. Hollis*, 13 Mass. 429, 432.

Although a mortgagee has brought an action for possession and foreclosure, he may nevertheless, at any time while such action is pending, make a peaceable entry for the same purpose. *Mann v. Earle*, 4 Gray 299.

*"Or he may make an open and peaceable entry thereon."* Such entry, if made by a mortgagee after he has quitclaimed to a third party his interest in a portion of the mortgaged premises, will nevertheless be sufficient for the foreclosure of the mortgage as to all the premises covered by it, even the portion so quitclaimed. *Raymond v. Raymond*, 7 Cush. 605, 608.

It seems that where several distinct and detached parcels of land are mortgaged by one deed, an entry on one will be a good entry on the whole. *Bennett v. Conant*, 10 Cush. 163, 165. — *Lennon v. Porter*, 5 Gray 318, 320.

Even though the entry made be in fact not *open*, but *secret*, it will be sufficient for the purpose of foreclosure, if a proper certificate of two witnesses according to section 2, be made and recorded. *Ellis v. Drake*, 8 Allen, 161, 163.

*"And such possession \* \* \* continued peaceably."* No actual possession by the mortgagee is required; the *constructive* possession, which the law presumes to continue after his formal entry, is sufficient under the statute. *Ellis v. Drake*, 8 Allen 161, 163. — *Hobbs v. Fuller*, 9 Gray 98. — *Palmer v. Fowley*, 5 Gray 545, 546, 548. — *Cronin v. Hazletine*, 3 Allen, 324. — *Bennett v. Conant*, 10 Cush. 163, 166. — *Swift v. Mendell*, 8 Cush. 357. — *Raymond v. Raymond*, 7 Cush. 605, 609. See, however, 26 Law Reporter 602, for remarks upon these cases.

*"For three years."* In computing such three years, the day of the entry is to be excluded. *Fuller v. Russell*, 6 Gray, 128.

For a case in which the three years may be slightly extended, see note to section 12.

Whether, after the three years, a receipt of interest by the mortgagee, or a parol agreement between him and the mortgagor, can operate to waive the foreclosure, or to extend the time for redemption, quære. See *Lawrence v. Fletcher*, 10 Met. 344, 347.

If, after an entry in pais, the mortgagee brings an action for possession, and enters under the judgment, the three years will run from the time of the last entry. *Fay v. Valentine*, 5 Pick. 418. — *Page v. Robinson*, 10 Cush. 99, 101.

SECT. 2. *Certificate by mortgagor.* Where a mortgagor signs a certificate according to this section, he and those claiming under him are estopped to deny that an entry was made as stated in such certificate. *Bennett v. Conant*, 10 Cush. 163, 166. — *Oakham v. Rutland*, 4 Cush. 172. — *Lawrence v. Fletcher*, 10 Met. 344, 347.

The following would seem to be a proper form for a certificate by a mortgagor. It is specially to be noted that such certificate must, by the terms of this section, be "*made on the mortgage deed.*"

I, A. B., the within-named mortgagor [or, N. O., the person claiming under the within-named mortgagor], hereby acknowledge and certify that C. D., the within-named mortgagee [or, E. F., the assignee of the within mortgage] has this day [by R. S., his agent thereto duly authorized] made an open, peaceable, and unopposed entry upon the premises described in the within mortgage for breach of the condition therein contained.

Witness my hand, this seventh day of January, A.D. 1869.

*Certificate of two witnesses.* It is not necessary that such certificate, like that by the mortgagor, should be made on the original mortgage. *Bartlett v. Johnson*, 9 Allen 530, 535.

It seems that a certificate of two witnesses, duly made and recorded as provided in this section, will be conclusive evidence that an entry was made as therein set forth. *Ellis v. Drake*, 8 Allen 161, 163. But it will not be conclusive evidence that there has been any breach of condition such as to authorize the entry. *Pettee v. Case*, 11 Gray 478.

## 442 FORECLOSURE AND REDEMPTION OF MORTGAGES.

The following would seem to be a proper form for a certificate by two witnesses:—

We hereby certify that we were this day present and saw C. D., the mortgagee named in a certain mortgage deed given by A. B., dated, &c., and recorded, &c. [or, E. F., the assignee of a certain mortgage given by A. B. to C. D., dated, &c., and recorded, &c.], make an open, peaceable, and unopposed entry on the premises described in the said mortgage for the purpose by him declared of foreclosing said mortgage for breach of the condition thereof.

Witness our hands, this seventh day of January, A.D. 1869.

P. R.  
S. T.

---

### COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

BOSTON, 7th January, 1869.

Then personally appeared the above-named P. R. and S. T., and made oath that the above certificate by them subscribed is true, before me.

U. H. C., *Justice of the Peace.*

*Recording of certificate.* If the original mortgage is not recorded in the same registry with the certificate, the register of deeds where the mortgage is recorded shall, upon the certificate duly recorded being exhibited to him, make a note of reference to the record of such certificate in the margin of the record of the mortgage, and may charge twenty-five cents therefor. St. 1868, c. 197.

A certificate, duly recorded as provided in this section, is constructive notice of the entry to all persons who claim by any title acquired subsequently to the mortgage under which the entry is made. *Robbins v. Rice*, 7 Gray 202, 203. — *Lennon v. Porter*, 5 Gray 318, 319.

*Evidence of entry under earlier laws.* Prior to the Revised Statutes, though an entry in the presence of witnesses was one of the prescribed methods of foreclosing mortgages, no *certificate* of the facts was required to be made,—and prior to St. 1785, c. 22, s. 2 even the *presence of witnesses* at the entry was not necessary. See *Whitney v. Gould*, 11 Gray 496, 501. —

*Skinner v. Brewer*, 4 Pick. 468. — *Thayer v. Smith*, 17 Mass. 429. — *Scott v. McFarland*, 13 Mass. 309, 314. Prior to the provision for recording a certificate of the entry, such entry was effectual only against those who had notice of it, express or implied. *Thayer v. Smith*, 17 Mass. 429. — *Gibson v. Crehon*, 5 Pick. 146, 151. — *Gibson v. Crehon*, 3 Pick. 475. — *Lund v. Woods*, 11 Met. 566. As to the mode of proving an entry, prior to the provision for recording a certificate, see *Crittenden v. Rogers*, 8 Gray 452, 454.

SECT. 3. An action under this section is not properly a *writ of entry*. *Webster v. Vandeventer*, 6 Gray 428, 430. But see *Robbins v. Rice*, 7 Gray 202.

An action under this section cannot be maintained by one of two joint mortgagees, where the mortgage was given to secure a joint debt. *Webster v. Vandeventer*, 6 Gray 428, 430. But it seems that where a mortgage has been given to two, to secure their several demands, either mortgagee may bring an action alone to enforce his own demand. *Burnett v. Pratt*, 22 Pick. 556. And where a mortgage has been given to two, to secure a note to them jointly, in the case of the death of one mortgagee, an action to foreclose may be brought by the survivor. *Blake v. Sanborn*, 8 Gray 154. If however the mortgage was given to secure separate notes, the surviving mortgagee cannot bring an action in behalf of the one that has deceased. *Burnett v. Pratt*, 22 Pick. 556. — *Blake v. Sanborn*, 8 Gray 154, 155.

It is not necessary, in order to cut off her dower, to join the wife of the mortgagor as defendant in an action to foreclose a mortgage which she has signed for the purpose of releasing her dower. *Pitts v. Aldrich*, 11 Allen 39.

If two distinct parcels are included in one mortgage, and the mortgagor conveys such parcels to different persons, the mortgagee must bring two separate actions to foreclose such mortgage. *Taylor v. Wilson*, 7 Mass. 354.

It seems that one action cannot be brought to foreclose two mortgages to the same person, if such mortgages cover differ-

ent parcels of land and are given to secure different debts. See *Peck v. Hapgood*, 10 Met. 172, 173.

But the assignee of two mortgages upon the same land, although such mortgages were given at different times to different mortgagees, may bring one action to foreclose them both. *Pierce v. Balkam*, 2 Cush. 374.

For cases as to the form of declaring, &c., prior to the present statute, see *Erskine v. Townsend*, 2 Mass. 493, 496. — *Green v. Kemp*, 13 Mass. 515, 519. — *Partridge v. Gordon*, 15 Mass. 485. — *Somes v. Skinner*, 16 Mass. 348, 355.

*Pleadings in actions under this chapter.* With regard to these, see *Olney v. Adams*, 7 Pick. 31. — *Wheelwright v. Freeman*, 12 Met. 154. — *Richmond Iron Works v. Woodruff*, 8 Gray 447. — *Webster v. Vandeventer*, 6 Gray 428.

SECT. 5. "*The court shall inquire and determine.*" The court may submit to a jury any disputed questions of fact as to the amount due. *Foss v. Hildreth*, 10 Allen 80, 81. — *Slayton v. McIntyre*, 11 Gray 271, 275. But see *Laffin v. Brown*, 7 Met. 576, 581.

"*How much is due.*" If it appears that *nothing is due*, the plaintiff will not be entitled to any judgment, although, by reason of the fact that the debt secured by the mortgage was not paid until *after* the day when it became due, there had been a breach of the condition of the mortgage and the technical legal title was still in the mortgagee. *Slayton v. McIntyre*, 11 Gray 271.

The amount to be named in the conditional judgment is the whole amount due at the time when the judgment is entered, not what was due when the action was commenced. *Stewart v. Clark*, 11 Met. 384.

The amount due is to be determined according to equity and good conscience, although Rev. St. c. 107, s. 29, has not been re-enacted in the General Statutes. *Holbrook v. Bliss*, 9 Allen 69.

The amount to be ascertained is, not what would be due between the parties upon a settlement of all mutual demands

between them, but of what is due upon the mortgage. *Bird v. Gill*, 12 Gray 60. But in case of an express agreement between the parties to that effect, the mortgagor may be entitled to set off a distinct debt. *Holbrook v. Bliss*, 9 Allen 69, 77.

The amount due, as fixed by the conditional judgment, is conclusive in a subsequent suit in equity to redeem the mortgaged premises. *Sparhawk v. Wills*, 5 Gray 423, 427.

As to the rule by which the amount due is to be determined, when illegal interest has been taken, see *Minot v. Sawyer*, 8 Allen 78. — *Hart v. Goldsmith*, 1 Allen 145.

Unless the execution, and the officer's return thereon, be recorded in the registry of deeds, according to section 55 of chapter 133, the three years necessary for foreclosure will not run except as against parties to the action and their heirs and devisees and those having actual notice. See *Robbins v. Rice*, 7 Gray 202, 203. This recording of the execution was first required by St. 1848, c. 144, s. 1.

SECT. 6. For the origin and purpose of this section, see *Holbrook v. Bliss*, 9 Allen 69, 73.

It seems that if a mortgage be given to secure the performance of various duties from time to time, the court might enter a decree toties quoties, as in equity, and might issue proper process to carry such decree into effect. *Stewart v. Clark*, 11 Met. 384, 389. — *Holbrook v. Bliss*, 9 Allen 69, 73.

SECT. 7. An assignee of a mortgage may bring action for possession, although the assignment to him has not been recorded. But it seems that such assignment must be recorded before the *trial* of the action. *Wolcott v. Winchester*, 15 Gray 461, 466, 467.

One who has received from a mortgagee a deed of the mortgaged premises, though unaccompanied by any transfer or assignment of the mortgage note, may maintain such action. *Ruggles v. Barton*, 13 Gray 506, 507.

SECT. 8. "*The action may be brought \* \* \* against whoever is tenant of the freehold.*" It seems that any party who, al-

though a mere tenant for years or at will, refuses to yield possession to the mortgagee, when it is demanded by him, may be considered a disseisor, and therefore, as against him, tenant of the freehold. *Johnson v. Phillips*, 13 Gray 198, 199. — *Wheelwright v. Freeman*, 12 Met. 154, 156. — *Keith v. Swan*, 11 Mass. 216. — *Hunt v. Hunt*, 17 Pick. 118, 121.

If the action be brought by the mortgagee against the mortgagor in possession, it will not be defeated by any subsequent conveyance by the mortgagor, but all persons coming in under the mortgagor after the commencement of the action will be bound by the judgment and the possession taken under it. *Hunt v. Hunt*, 17 Pick. 118, 121. It seems that the result would be the same, if the action were brought, not against the mortgagor, but against any other party who might be the tenant of the freehold, or who might be deemed such according to the cases cited above. It seems, also, that parties acquiring title under the mortgagor *prior* to the commencement of the action, but subsequently to the mortgage, to foreclose which the action is brought, will be equally bound, though not joined as defendants. But in order to affect those not parties to the action, or not having actual notice of it, the execution and the doings thereon must be recorded pursuant to chapter 133, section 55. See *Hunt v. Hunt*, 17 Pick. 118, 123. — *Robbins v. Rice*, 7 Gray 202, 203.

SECT. 9. Where there is no agreement to the contrary, a mortgagee has a right to immediate possession of the mortgaged premises, and may eject the mortgagor before breach of condition. *Lackey v. Holbrook*, 11 Met. 458. — *Newhall v. Wright*, 3 Mass. 138, 152, 155. Such agreement for possession by the mortgagor cannot be shown by parol evidence. *Coleman v. Packard*, 16 Mass. 39. But it may sometimes appear by *necessary implication* from the provisions of the mortgage. Thus where, in a mortgage from A. to B. it was recited that the mortgaged premises had been conveyed by B. to A. "for the future maintenance and support" of B., and that A. had

"at the same time reconveyed the same to B. as security for such maintenance and support," and the condition was that A. should support B., &c. ; it was held to be a necessary implication from these provisions and recitals, that A. should retain possession, while performing the acts to secure performance of which the mortgage had been given. *Wales v. Mellen*, 1 Gray 512, 513.

SECT. 10. This section adopts the law as laid down in the early cases of *Pomeroy v. Winship*, 12 Mass. 513. — *Scott v. McFarland*, 13 Mass. 309, 313. — *Newhall v. Wright*, 3 Mass. 138, 155. — *Erskine v. Townsend*, 2 Mass. 493, 496.

SECT. 11. For the case of an action to foreclose, maintained as provided in this section, although the plaintiff was already in possession, see *Merriam v. Merriam*, 6 Cush. 91.

*Redemption.*

SECT. 13. "*Or any person lawfully claiming or holding under him.*" This does not include those having only an *equitable* title to the right of redemption, or claiming it merely under contracts of purchase, but is intended to comprehend only those to whom the *legal title* of the mortgagor has been transferred by deed or by operation of law." *McDougald v. Capron*, 7 Gray 278, 279. It is to be noted, however, that this case arose before the supreme court had full equity powers.

But under this provision a tenant for years may redeem a mortgage made by his lessor, and *it seems* that one who has only an easement in the mortgaged premises may redeem them. *Bacon v. Bowdoin*, 22 Pick. 401, 404, 405.

So a wife, having an inchoate right of dower in the equity of redemption, is entitled, even during the lifetime of her husband, to redeem a mortgage given by him, and in which she has herself joined in release of dower. *Davis v. Wetherell*, 13 Allen 60, 62.

"*For three years.*" Assignees in insolvency are in certain cases entitled to redeem after the three years. St. 1862, c. 179, s. 7.



In computing such three years, the day of the entry is to be excluded. *Fuller v. Russell*, 6 Gray 128.

SECT. 14. "*To the mortgagee or person lawfully claiming or holding under him.*" Payment to the mortgagee, after he has assigned the mortgage and the assignment has been recorded, will be of no avail to the mortgagor. *Merriam v. Bacon*, 5 Met. 95, 97.

"*The whole sum then due and payable.*" The widow of a mortgagor forms no exception to the rule, and cannot redeem except upon payment of the *whole* amount due. *McCabe v. Bellows*, 7 Gray 148.

As to the proper tender to be made, when only interest is due, see *Saunders v. Frost*, 5 Pick. 259, 269.

SECT. 15. "*If the mortgagee or any person under him has had possession of the premises, he shall account,*" &c. The *possession* here referred to is an *actual* one, — a merely *constructive* possession, though sufficient for the purpose of foreclosure, will not render a mortgagee liable for rents and profits. *Charles v. Dunbar*, 4 Met. 498, 503. — *Richardson v. Wallis*, 5 Allen 78, 80.

"*For the rents and profits.*" The rents and profits for which a mortgagee in actual possession is liable to account, are not only such as he may have actually received, but such as he might, by the exercise of reasonable care and diligence, have received. *Richardson v. Wallis*, 5 Allen 78, 79. — *Strong v. Blanchard*, 4 Allen 538, 543, 544. — *Hubbard v. Shaw*, 12 Allen 120, 123. Thus he will be accountable for the rent during the time for which he suffers a notoriously insolvent tenant to remain in possession, deducting the time reasonably necessary to expel such tenant by legal process and to obtain a responsible tenant. *Miller v. Lincoln*, 6 Gray 556. But he will not be chargeable with rent due from a tenant who has absconded, where there has been no negligence on his part in the collection of such rent. *Saunders v. Frost*, 5 Pick. 259, 270.

"*And shall be allowed for all sums,*" &c., &c. No allow-

ances are to be made for payments for any purposes not *strictly embraced* within the provisions of this section. *Strong v. Blanchard*, 4 Allen 538, 544.

“*Expended in reasonable repairs and improvements.*” The mortgagor is to be charged with no more of the cost of repairs or improvements than is beneficial to the estate. *Reed v. Reed*, 10 Pick. 398, 400. — *Boston Iron Co. v. King*, 2 Cush. 400, 405. — *Adams v. Brown*, 7 Cush. 220, 222.

“Disbursements for improvements merely ornamental, and which are not necessary for the upholding of the estate, and do not contribute any thing to its permanent value, are not to be allowed.” *Reed v. Reed*, 10 Pick. 398, 400.

For other cases relating to the nature of the repairs or improvements for which allowances may properly be made, see *Woodward v. Phillips*, 14 Gray 132. — *Sparhawk v. Wills*, 5 Gray 432. — *Saunders v. Frost*, 5 Pick. 259, 270.

“*All other necessary expenses,*” &c. Under the law existing prior to the Revised Statutes (St. 1798, c. 77, s. 1), and which did not contain the words quoted above, it was held that a mortgagee was not to be allowed sums paid by him for insurance of the mortgaged premises. *Saunders v. Frost*, 5 Pick. 259, 270.

On a bill, by a widow of a mortgagor, to redeem a mortgage in which she had joined, it was held that the mortgagee was not to be allowed for a sum which he had been compelled to pay to discharge a lien which had priority over his mortgage, but which was not valid as against the widow. *Van Vronker v. Eastman*, 7 Met. 157, 161. — *McCabe v. Bellows*, 7 Gray 148, 149.

A mortgagee is entitled to be allowed for reasonable counsel fees paid in a proper endeavor to collect the rents and profits, and is not liable for damages done to the estate without his knowledge by his tenant, provided the latter was one to whom the estate might properly be leased, nor for wood cut and used on the premises for firewood and repairs by such tenant, he being a tenant for years. *Hubbard v. Shaw*, 12 Allen 120.

The mortgagee will be entitled to compensation for his services in the care and management of the estate while in his possession, and such compensation may be more or less than a commission of five per cent on the rents received, according to the peculiar circumstances of each case. *Adams v. Brown*, 7 Cush. 220, 222.

"*If on such account there is a balance,*" *§c.* In making up such account, any excess of the rents and profits over the amounts expended in repairs, &c., is to be applied to the payment of interest accrued, before any part is applied to the reduction of the principal. *Van Vronker v. Eastman*, 7 Met. 157, 168. — *Reid v. Reid*, 10 Pick. 398, 401. — *Saunders v. Frost*, 5 Pick. 259, 270.

SECT. 16. It seems that a suit may be maintained under this section against a purchaser at a sale under a power in a power of sale mortgage, when such sale takes place after a tender of the amount due on the mortgage has been made and refused, and the purchaser has notice of the facts. *Cranston v. Cram*, 97 Mass. 459, 465.

SECT. 21. "*Has unreasonably refused,*" *§c.* As to what amounts to an unreasonable refusal, see *Willard v. Fiske*, 2 Pick. 540. — *Fay v. Valentine*, 2 Pick. 546.

When a suit has been brought without previous tender, and the defendant has not rendered a correct account, *neither party* will be entitled to costs. *Woodward v. Phillips*, 14 Gray 132, 133.

"*In all other cases, §c., the court may in their discretion award costs to either party,*" *§c.* For a case in which the court in its discretion awarded costs to neither party, see *Saunders v. Frost*, 5 Pick. 259, 271.

As to the allowance of costs, when different defendants file separate answers, see *Miller v. Lincoln*, 6 Gray 556.

SECT. 24. When a suit for redemption is commenced by *bill and subpoena*, the filing of the bill is the commencement of the suit. *Van Vronker v. Eastman*, 7 Met. 157, 161.

For a case in which a bill to redeem was dismissed, for the reason that the writ or a copy thereof had not been deposited in the clerk's office within the three days, as provided in this section, see *Sanborn v. Dennis*, 9 Gray 208.

SECT. 25. "*What sum is due on the mortgage.*" Where the mortgagee enters for non-payment of interest, and, pending a bill to redeem, the principal becomes due, the decree should be for the payment of the whole sum then due, both principal and interest. *Adams v. Brown*, 7 Cush. 220.

As to the proper form of decree, where the entry was for non-payment of interest, and the principal was not yet due, and the mortgagee had a right to possession even before breach of condition, see *Saunders v. Frost*, 5 Pick. 259, 268, 269. See also similar case of *Mann v. Richardson*, 21 Pick. 355.

As to the mode of computing the amount due when usurious interest has been taken or reserved, see *Hart v. Goldsmith*, 1 Allen 145.

SECT. 26. "*Has not unreasonably neglected or refused to render a true account.*" See note to section 21.

SECT. 28. Prior to this statute provision, the mortgagor was put to his action at law to recover any balance due from the mortgagee. *Taylor v. Weld*, 6 Mass. 264.

SECT. 30. For a case in which an action was brought, as provided in this section, to recover back an excess, see *Wood v. Felton*, 9 Pick. 171.

SECT. 34. The commissioners on the Revised Statutes of 1836 say that "This section is proposed to adopt and confirm the decision of the court in" *Parker v. Lincoln*, 12 Mass. 16.

#### *Opening of Foreclosure.*

SECT. 36. As to the right of a mortgagee, after foreclosure, to bring an action against the mortgagor on the mortgage note, to recover the difference between the amount of the note and the value of the estate, see *Amory v. Fairbanks*, 3 Mass. 562.

## 452 FORECLOSURE AND REDEMPTION OF MORTGAGES.

—Newall *v.* Wright, 3 Mass. 138, 150, 154.—Hedge *v.* Holmes, 10 Pick. 380, 381.—West *v.* Chamberlin, 8 Pick. 336, 338.

It seems that a foreclosure may be opened, not only in the manner specified in this section, but by an express agreement of the parties, or by facts and circumstances from which such an agreement can be inferred,—but the mere fact that, after the three years, payments were made on account of the mortgage debt will not be sufficient. Lawrence *v.* Fletcher, 8 Met. 153, 165.

### *Mortgages by Defeasance.*

SECT. 37. “*With a separate deed of defeasance.*” When the instrument of defeasance is not under seal, the mortgage is not within the provisions of this chapter. Eaton *v.* Green, 22 Pick. 526, 531.

As to what constitutes a “deed of defeasance,” see Bayley *v.* Bailey, 5 Gray 505.—Murphy *v.* Calley, 1 Allen 107.—Rice *v.* Rice, 4 Pick. 349.—Trull *v.* Skinner, 17 Pick. 213, 216.—Harrison *v.* Trustees of Phillips Academy, 12 Mass. 455, 463.—Newhall *v.* Burt, 7 Pick. 157.—Flagg *v.* Mann, 14 Pick. 467, 479, 480.—McIntier *v.* Shaw, 6 Allen 83.—Eaton *v.* Green, 22 Pick. 526, 530.—Vulleran *v.* Brown, 4 Mass. 443, 445.—Robinson *v.* Robinson, 9 Gray 447.

### *Mortgages with Power of Sale.*

SECT. 42. The affidavit provided for by this section need not allege the rendering of an account, nor the disposition that has been made of the purchase-money. Childs *v.* Dolan, 5 Allen 319.

If the original mortgage is not recorded in the same registry with the affidavit, the register of deeds where the mortgage is recorded, shall, upon the affidavit, duly recorded, being exhibited to him, make a note of reference to the record of such affidavit in the margin of the record of the mortgage, and may charge twenty-five cents therefor. St. 1868, c. 197.

## CHAPTER CXLI.

### OF INFORMATIONS FOR INTRUSION AND THE RECOVERY OF LANDS BY THE COMMONWEALTH.

SECT. 14. “*If it is in favor of the defendant, the costs shall be paid out of the treasury,*” &c. As to the mode of paying such costs, see further provision in St. 1862, c. 144.

---

## TITLE IV.

### OF CERTAIN WRITS AND PROCEEDINGS IN SPECIAL CASES.

---

## CHAPTER CXLII.

### OF TRUSTEE PROCESS.

#### *Commencement and Service of Process.*

SECT. 1. “*All personal actions.*” An action of tort in the nature of trespass quare clausum fregit is a personal action within the meaning of this section. *Way v. Dame*, 11 Allen 357.

“*And any person.*” A non-resident, though actually served with process as trustee, is not liable to be held as such. *Smith v. Mutual Life Insurance Co. of New York*, 14 Allen 336, 342. — *Ray v. Underwood*, 3 Pick. 302.

As to how far persons residing in this state are chargeable for funds, &c., in the possession of a partnership having its place of business out of the state, and of which they are members, see *Parker v. Danforth*, 16 Mass. 299. — *Hart v. Anthony*, 15 Pick. 445. — *Kidder v. Packard*, 13 Mass. 80.

Guardians are not subject to be trustees for the debts of their wards. *Gassett v. Grout*, 4 Met. 489.

A single plaintiff cannot summon himself, nor can several plaintiffs summon one of their own number as trustee. *Belknap v. Gibbens*, 13 Met. 471.

*"Or corporation."* Foreign corporations, established only by the laws of another state, cannot be charged by the trustee process in this state. *Gold v. Housatonic R.R. Co.*, 1 Gray 424. — *Danforth v. Penney*, 3 Met. 564.

SECT. 4. This section allows an action of tort in the nature of trespass quare clausum fregit, when commenced by trustee process, to be returnable in a county in which the land does not lie. *Way v. Dame*, 11 Allen 357.

*"If all the persons named in the writ."* The word "persons" includes corporations. *Lewis v. Denney*, 4 Cush. 588. See also Gen. St. c. 3, s. 7, clause 13.

*"The writ shall be returnable in such county," &c.* The service of a trustee process on a trustee, living out of the county where the writ is returnable, is void or voidable, if the writ does not, at the time of such service, contain the name of a trustee living in the county where it is returnable, and the subsequent insertion of such a name before the writ is served on the principal defendant will not cure the defect. *Hooper v. Jellison*, 22 Pick. 250.

A trustee process brought in a county, in which no one of the trustees dwells, will be dismissed on motion of a trustee named therein, or of the principal defendant. *Lewis v. Denney*, 4 Cush. 588.

Where a plaintiff in a trustee process, brought in a county in which he resided, inserted therein the name of a person, residing in another county, as defendant, in his individual capacity, and the same person, in the capacity of administrator, as trustee, the court held that it could not, at the plaintiff's suggestion, made after the defendant had appeared, answered, and been discharged as trustee, treat as surplusage all that part of the writ relating to the trustee. *Brown v. Webber*, 6 Cush. 560. So where a trustee process was brought in a wrong county as

to the trustee, it was held that the action could not be maintained after a discontinuance against the trustee. *Lewis v. Denney*, 4 Cush. 588. But it has been held to be no ground of abatement of a trustee process, brought in the county where the defendant resides, and duly served upon him, that the trustee resides out of the commonwealth. *Barrows v. Rose*, 7 Gray 282.

A defendant in a trustee process, who has appeared generally, cannot, after verdict against him, object to the jurisdiction of the court on the ground that the action was not brought in the county in which the trustee resides. *Brown v. Webber*, 6 Cush. 560. It seems, also, that if execution is obtained in a suit brought contrary to this section, the trustee will be protected if he pays over. *Dole v. Boutwell*, 1 Allen 286.

If a person summoned as trustee out of his own county, does not appear, but is defaulted, he is liable to a scire facias in that county, especially if he does not move to dismiss the latter suit until after several terms of court. *Murphy v. Merrill*, 12 Cush. 284.

SECT. 5. "*Served on the defendant.*" It seems that where there has been an attachment of the property of the principal defendant, the suit may be maintained against him, although all the trustees are discharged, and although no separate summons was served upon him, as required by Gen. St. c. 123, ss. 11, 23. *Belknap v. Gibbens*, 13 Met. 471, 475.

"*And each of the trustees.*" Where several persons are jointly liable as trustees, as holding a credit, or being the debtors of a principal defendant, it seems that they should all be served with process, if inhabitants of the commonwealth and within the reach of process. *Warner v. Perkins*, 8 Cush. 518. — *Hathaway v. Russell*, 16 Mass. 473. Where two or more persons are severally liable for the same debt, it is also important that all should be summoned, as any of the debtors omitted may discharge the obligation during the pendency of the process, though they have knowledge of it. Those summoned cannot



object to the non-joinder of the others, as in the case of a joint liability, but they may avail themselves of any payment or discharge made during the pendency of the action by their co-debtors. *Jewett v. Bacon*, 6 Mass. 60.

SECT. 6. See notes on section 4.

SECT. 7. In a case where the trustee was discharged, and the writ was made returnable in the county neither of the plaintiff nor of the defendant, but in that of the trustee, and where service on the defendant and the trustee was made by copy, it was held that the defendant, after appearing and filing an affidavit of merits, could not maintain a motion to dismiss on the ground of an insufficient service. *Lucas v. Nichols*, 5 Gray 309, 311. It seems that in such case the objection to the venue of the action could not be maintained by the defendant, at whatever stage of the proceedings or in whatever form such objection might be raised. *Brown v. Webber*, 6 Cush. 560, 569. — *Belknap v. Gibbens*, 13 Met. 471.

*Appearance and Answer of Trustee.*

SECT. 8. “*Shall appear and file his answer within the first ten days,*” &c. The trustee may be allowed by the court to file additional answers after the expiration of the ten days, and even after the plaintiff has filed allegations according to the provisions of section 11, and has proceeded to prove the same. This being a matter within the discretion of the court, its decision is not subject to exception. *Hovey v. Crane*, 12 Pick. 167. — *Carrique v. Sidebottom*, 3 Met. 297. — *Collins v. Smith*, 12 Gray 431, 434. — *Winsted Bank v. Adams*, 97 Mass. 110. Such additional answers shall, in deciding how far the trustee is chargeable, be considered as true, in the same manner as the original answer. *Winsted Bank v. Adams*, 97 Mass. 110.

If the trustee files his answer after the expiration of the ten days, without obtaining the leave of court, he is not entitled to costs, although the plaintiff has not moved that he be defaulted. *Phillips v. Flanders*, 14 Gray 453.

*"The answer shall be sworn to by the trustee."* Where partners are summoned as such, it is sufficient if the answer is sworn to by one of them. *Gerry v. Gerry*, 10 Allen 160. As to whether it is necessary for persons who are liable jointly, to answer individually, if they are summoned individually, see *Gerry v. Gerry*, 10 Allen 160.—*Hennessey v. Farrell*, 4 Cush. 267.

*"As plainly, fully, and particularly as practicable."* If the trustee has answered an interrogatory fully and intelligibly, the court will not require him to answer further, on his being asked to answer the interrogatory distinctly. *Carrique v. Sidebottom*, 3 Met. 297. See also *Warner v. Perkins*, 8 Cush. 518.—*Hawes v. Langton*, 8 Pick. 67.

*Form of Trustee's Answer.*

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT. SUFFOLK, SS.

January Term, 1870.

*John Doe v. Richard Roe and Trustee.*

ANSWER OF JOHN STILES, ALLEGED TRUSTEE.

And now John Stiles, summoned as trustee of the principal defendant in the above entitled action, appears and makes answer that, at the time of the service of the plaintiff's writ upon him, he had not in his hands or possession any goods, effects, or credits of the said defendant.

Wherefore he prays that he may be discharged, and for his costs.

(Signed) JOHN STILES.

---

BOSTON, 1st January, 1870.

Then the above named John Stiles made oath that the foregoing answer subscribed by him is true, before me.

X. Y., *Justice of the Peace.*

When the person summoned as trustee has goods, effects, or credits in his hands or possession, the answer should be in the following form:—

And now John Stiles, summoned as trustee of the defendant in the above entitled action, appears and makes answer that, at the time of the service of the plaintiff's writ upon him, he owed the said defendant one hundred dollars, but did not have any other goods, effects, or credits of the said defendant in his hands or possession.

In suits before a justice of the peace or a police court it is not necessary that the trustee's answer should be made on oath. In such cases the following clause should be inserted after the statement of facts: "and of this the said trustee submits himself to be examined on oath." It seems that the trustee cannot, by our statutes, recover costs unless he answers upon oath. Gen. St. c. 142, s. 60.

SECT. 9. "*Interrogatories.*" The plaintiff may put interrogatories to the trustee, calculated to elicit facts that may tend to charge him, but he has no right to ask questions for the purpose of discrediting his disclosure; hence he is not entitled to the privilege of a cross-examination, and what the trustee may have told other persons, or may have said on former occasions, is immaterial, and not a proper subject of inquiry. *Crossman v. Crossman*, 21 Pick. 21.

"*The court may pass such order as the case may require.*" If the interrogatories have been previously answered, or are impertinent or immaterial, the court will not require the trustee to answer them. This is a matter within the discretion of the court, and hence its decision is not subject to exception. *Warner v. Perkins*, 8 Cush. 518. — *Piper v. Willard*, 6 Pick. 461.

SECT. 10. Corporations could not be summoned as trustees prior to the St. 1832, c. 164. *Union Turnpike Road v. Jenkins*, 2 Mass. 37.

Foreign corporations cannot be summoned as trustees. *Danforth v. Penny*, 3 Met. 564. — *Gold v. Housatonic R.R. Co.*, 1 Gray 424.

SECT. 11. As to reasons for the provisions of this section, and as to the law under former statutes, see *Comstock v. Farnum*, 2 Mass. 96. — *Stackpole v. Newman*, 4 Mass. 85. — *Wood v. Partridge*, 11 Mass. 488. — *Willard v. Sturtevant*, 7 Pick. 194. — *Hawes v. Langton*, 8 Pick. 67. — Commissioners' Report on the Revised Statutes, notes on c. 109, s. 15.

"*In deciding how far he is chargeable.*" A person summoned as trustee is to be charged or not, according as, on a

just view of all the facts, the weight of evidence shall fairly preponderate, and if it is not affirmatively proved by the answers of the alleged trustee, or by the collateral proofs, that he is chargeable, then he is to be discharged; and, further, for a full discussion of the construction to be put upon the answers of a trustee, see *Porter v. Stevens*, 9 Cush. 530. See also *Harris v. Aiken*, 3 Pick. 1. — *Williams v. Reed*, 5 Pick. 480, 482. — *Ripley v. Severance*, 6 Pick. 473, 477. — *Kelly v. Bowman*, 12 Pick. 383. — *Shaw v. Bunker*, 2 Met. 376. — *Driscoll v. Hoyt*, 11 Gray 404.

“*Either party.*” These words include the trustee. *Staniels v. Raymond*, 4 Cush. 314.

“*Any other facts,*” &c. See *Gouch v. Tolman*, 10 Cush. 104.

SECT. 14. An action of tort under this section cannot be maintained on the testimony of one witness only to the falsity of the answer; but the same amount of evidence is required as would be necessary to convict the defendant of perjury. *Laughran v. Kelly*, 8 Cush. 199.

An action of tort under this section is defeated by the death of the defendant. *Stillman v. Hollenbeck*, 4 Allen 391.

“*Upon his examination on oath.*” If a trustee, who has been defaulted, voluntarily makes answer under oath to a scire facias brought against him, he thereby renders himself liable to an action under this section, if he knowingly and wilfully answers falsely as to any fact material to his liability as trustee. *Laughran v. Kelly*, 8 Cush. 199.

*Proceedings in Relation to Adverse Claimants.*

SECT. 15. “*The court may permit such claimant to appear,*” &c. It is the claimant’s legal right to appear. *Boylen v. Young*, 6 Allen 582.

The claimant may appear and maintain his right, although the party summoned as trustee makes no mention of any assignment in his answer. *Dennis v. Twitchell*, 10 Met. 180, 183.

The claimant’s appearance may be made after the trustee has

been defaulted, and it is not too late, even if it is not made until scire facias is brought against a defaulted trustee. *Boylan v. Young*, 6 Allen 582. — *Knights v. Paul*, 11 Gray 225.

“*By force of an assignment.*” An assignment, whether legal or equitable, is good as against trustee process, even without the assent of or notice to the debtor. *Dennis v. Twitchell*, 10 Met. 180, 183. See also *Carrique v. Sidebottom*, 3 Met. 297. — *Ammidown v. Wheelock*, 8 Pick. 470. — *Providence County Bank v. Benson*, 24 Pick. 204, 210. — *Martin v. Potter*, 11 Gray 37. — *Eldridge v. Benson*, 7 Cush. 483. — *Wood v. Partridge*, 11 Mass. 488. — *Foster v. Sinkler*, 4 Mass. 450. But though the debtor cannot be held as trustee of the assignor, it does not follow that he can be held as trustee of the assignee, and he cannot be so held, unless he assented to the assignment before service. *Folsom v. Haskell*, 11 Cush. 470.

An assignment of future earnings is not valid against a trustee process, unless recorded in the office of the clerk of the city or town where the assignor resides. St. 1865, c. 43, ss. 2, 3. As to the law prior to this provision, in regard to the validity of an assignment of future earnings, see *Gragg v. Martin*, 12 Allen 498. — *Darling v. Andrews*, 9 Allen 106. — *Boylan v. Leonard*, 2 Allen 407. — *Lannan v. Smith*, 7 Gray 150. — *Emery v. Lawrence*, 8 Cush. 151. — *Taylor v. Lynch*, 5 Gray 49. — *Hartley v. Tapley*, 2 Gray 565.

Though the claimant be defaulted, if it nevertheless appears that he is entitled to the goods, &c., the trustee will be discharged. *Taylor v. Collins*, 5 Gray 50.

Where, by judicial proceedings in another state, the property of a debtor is, without his assent, assigned to trustees for the benefit of his creditors, such assignment will not be valid, as against a subsequent trustee process brought by a citizen of this state, to transfer a debt due to such debtor from another citizen of this state. *Taylor v. Columbian Ins. Co.*, 14 Allen 353, 355.

SECT. 16. If it appears that the property was assigned only

as collateral security, the excess over the amount due at the time of service is to be held by the trustee process. See St. 1865, c. 43, s. 1. For decisions to the same effect rendered prior to this statute, see *Macomber v. Doane*, 2 Allen 541. — *Darling v. Andrews*, 9 Allen 106. — *Carrique v. Sidebottom*, 3 Met. 297.

*Proceedings when Suit is pending against Trustee.*

These sections apply only when both suits are brought in this state. As to the rule when one is brought in another state, see *Whipple v. Robbins*, 97 Mass. 107.

SECT. 18. As to the proceedings where, during the pendency of an action, the plaintiff is summoned as trustee of the defendant on account of any demand filed in set-off in such action, see St. 1865, c. 155. See *Locke v. Tippetts*, 7 Mass. 149.

*When and for what Trustees are chargeable.*

SECT. 21. "The general rule is that a party is not chargeable in trustee process, unless he is liable in an action to the principal defendant, or has in possession chattels of his, which might be seized and sold on execution." *Field v. Crawford*, 6 Gray 116, 117.

"To constitute the relation of trustee there must be a privity of contract, express or implied, between the principal debtor in the trustee process and him who is sought to be charged as his trustee, unless there be a statute provision that renders such privity unnecessary. The court can go no further than to charge a debtor as trustee of his creditor, where the debt or demand is the ordinary result of an express or implied contract." Accordingly, a county is not chargeable for compensation due to a juror for his services, such services not being rendered on any contract express or implied between him and the county, but compulsorily, on a summons from the court. *Williams v. Boardman*, 9 Allen 570. — *Geer v. Chapel*, 11 Gray 18.

A person is not chargeable as trustee by reason of any lia-

bility for a tort committed by him, even after a verdict therefor has been rendered against him. *Thayer v. Southwick*, 8 Gray 229. See section 27.

Non-joinder of joint debtors as trustees in foreign attachment should be pleaded in abatement. *Sabin v. Cooper*, 15 Gray 532.

"*Goods, effects, or credits*," &c. Articles exempted from execution are not liable to attachment by trustee process. *Stanleys v. Raymond*, 4 Cush. 314. As to what articles are exempt from execution, see Gen. St. c. 133, s. 32, &c., and notes.

An attorney may be charged in trustee process for money collected by him for his client. *Cook v. Holbrook*, 6 Allen 572. — *Alexander v. Crittenden*, 4 Allen 342. — *Coburn v. Ansart*, 3 Mass. 319.

For a case in which a person was held liable to be charged as trustee, although he had lent the money deposited with him, see *Hooper v. Hills*, 9 Pick. 435. See also *Morse v. Bebee*, 2 Allen 466.

Where the parties to a wager on the event of an election place money in the hands of a third person as stakeholder, such third person is immediately liable in the trustee process to a creditor of either of them. *Ball v. Gilbert*, 12 Met. 397.

It seems that where a trustee under a will holds money to be applied to the use of, but not to be paid to, the principal defendant, he will not be chargeable for such money by trustee process. At least he will not be chargeable if such money is to be so applied at his discretion and so far as he may judge necessary. *Hinckley v. Williams*, 1 Cush. 490, 493.

Where, however, the trust was revocable at the pleasure of the cestui que trust, who could maintain an action against the trustee in the event of his refusal to pay over the money on demand, it was held that the trustee was chargeable. *Estabrook v. Earle*, 97 Mass. 302.

For a case in which the person summoned as trustee made

arrangements to prevent his liability to the trustee process and the arrangements were nevertheless held to be valid, see *Collins v. Smith*, 12 Gray 431, 437.

Where a debt is due to two or more persons jointly, the interest of one of them cannot be attached by trustee process in an action against him alone. *Hawes v. Waltham*, 18 Pick. 451. — *Foot v. Hunkins*, 14 Allen 15, 17. — *Bulfinch v. Winchenback*, 3 Allen 161.

One who has made a contract to deliver goods at a place out of the commonwealth, cannot be charged as the trustee of him to whom he has contracted to deliver them. *Clark v. Brewer*, 6 Gray 320. See section 54.

*"Intrusted or deposited in his hands or possession."* "A trustee is not chargeable for personal property belonging to the principal defendant, of which he has only the constructive possession; but it must be in his actual possession, or within his control, so that he may be able to turn it out to be disposed of on execution." *Andrews v. Ludlow*, 5 Pick. 28, 30. Moreover, the mere actual possession of property of the principal defendant by a party having no claim to hold it, does not render such party liable therefor as trustee. *Staniels v. Raymond*, 4 Cush. 314, 316. — *Cook v. Holbrook*, 6 Allen 572. One cannot be charged as trustee for a trunk left with him for safe-keeping, the contents of which he is ignorant of, and which he has no authority to unlock. *Bottom v. Clarke*, 7 Cush. 487.

Where chattels were delivered, without authority from the owner, to an agent of one of his creditors in pledge for a debt, and were removed by the agent to his own house, it was held that such removal under a claim to hold them as a pledge was a sufficient embarrassment to an attachment by the ordinary writ, to enable the plaintiff to resort for his security to the trustee process; it not being necessary, in order to sustain that process, that the chattels should be in the hands of the trustee by virtue of a contract with the debtor. *Swett v. Brown*, 5 Pick. 178.



For other cases bearing on this section, see *Wildes v. Nahant Bank*, 20 Pick. 352. — *Leland v. Drown*, 12 Gray, 437. — *Taylor v. Columbian Ins. Co.*, 14 Allen 353.

SECT. 22. "*Debts, legacies,*" &c. The trustee process takes effect from the time of service, and reaches the whole interest of the principal defendant that may eventually come into the hands of the executor or administrator. *Boston Bank v. Minot*, 3 Met. 507, 509. Thus it has been held, that the lien may attach in the case of a legacy, before the expiration of a year from the appointment of the executor or administrator, and even though it has not been ascertained that there are assets sufficient for the payment of such legacy (*Holbrook v. Waters*, 19 Pick. 354. — *Hoar v. Marshall*, 2 Gray 251, 253); in the case of next of kin entitled to a distributive share, before the decree of distribution (*Wheeler v. Bowen*, 20 Pick. 563); and in the case of a creditor of an insolvent estate, before a dividend has been declared. *Boston Bank v. Minot*, 3 Met. 507.

So, also, where there was no personal property to pay a legacy, it was held that the executor was nevertheless chargeable by trustee process, and that the case should be continued or execution stayed, in order to give the executor an opportunity to obtain a license to sell real estate to raise funds. *Cady v. Comey*, 10 Met. 459.

But it has been held that one who has been appointed administrator is not chargeable as trustee of one entitled to a distributive share, until after the filing and approval of his administration bond and the delivery to him of his letters of administration. *Davis v. Davis*, 2 Cush. 111.

"*An executor or administrator as such.*" This section has been held to give a right to maintain the trustee process only in cases where property is in the hands of an executor for the ordinary and usual purposes appertaining to that office, and not where an ulterior trust is conferred upon him, in express terms or by operation of law, which renders it necessary that the estate should be held for an indefinite period in his hands

as trustee for a legatee for life or for other special purposes. *Carson v. Carson*, 6 Allen, 397.

An executor is not chargeable under this section at the suit of a creditor of the heir of a deceased legatee, for the amount of a legacy remaining in his hands, but which was due to the legatee before his death. *Stills v. Harmon*, 7 Cush. 406.

SECT. 23. As to the law prior to the statute provision, see *Colby v. Coates*, 6 Cush. 558.

SECT. 24. See *Stone v. Hodges*, 14 Pick. 81, 85. See also notes on section 31, fourth clause.

SECT. 26. The cases that have arisen fully sanction the principle of allowing the trustee "every legal and every equitable set-off in his own right or in the right of those with whom he is privy." *Green v. Nelson*, 12 Met. 567, 573. — *Allen v. Hall*, 5 Met. 266. Where a part only of several joint contractors with the principal defendants were summoned as trustees, it was held that those who were summoned might be allowed the benefit of such set-offs as their copartners, not summoned, were entitled to against the principal defendants. *Hathaway v. Russell*, 16 Mass. 473.

As to the effect which a discharge in insolvency, obtained by the principal defendant, would have on a demand by the trustee against him, see *Bennett v. Caswell*, 7 Gray 153.

SECT. 28. "*But before he has knowledge thereof.*" In the case of an insurance company, it was held that it was not chargeable for the amount of a loss under a policy, after payment thereof made in good faith by its authorized agent, who had no knowledge of any actual or intended service upon the company, although such payment was made after service upon the secretary of the company, if there was no neglect of duty in giving notice of the service to such agent. *Spooner v. Rowland*, 4 Allen 485. — *Williams v. Kenney*, 98 Mass. 142.

"*In good faith.*" By payment in good faith, the statute means good faith on the part of the party paying, and not of the party receiving. See *Thorne v. Matthews*, 5 Cush. 544, 546.

The fact that the trustee, when he made payment, suspected that his creditor demanded it from an apprehension that a trustee process might be instituted, was held not to be a breach of good faith. *Robinson v. Hall*, 8 Met. 301.

SECT. 29. "*The wages*," &c. After wages have been collected by an attorney for his client, the money is attachable in the attorney's hands. *Cook v. Holbrook*, 6 Allen 572.

"*Debt or demand*." Under these words are included claims in tort as well as in contract. *Burns v. Marland Manufacturing Co.*, 14 Gray 487.

"*Necessaries*," &c. Medical services rendered by a physician in regular standing, and medicines furnished by him, are necessaries. *Darling v. Andrews*, 9 Allen 106.

Under the insolvent laws, Gen. St. c. 118, s. 79, it was held that "a claim for necessaries furnished to the debtor or his family" did not cover a claim for articles of the class considered necessary, furnished to a firm, but actually used in the families of the debtors (*Drake v. Bailey*, 5 Allen 210); neither did it cover articles of the class considered necessaries, furnished to a debtor who kept a boarding house, if the articles were used and consumed in common by the debtor and his family and boarders. *Lincoln v. Dunbar*, 7 Allen 264.

Further, as to what are "necessaries," see Gen. St. c. 90, s. 29, and notes thereon, and also Gen. St. c. 133, s. 32, and notes thereon.

"*A debt due for the services of the wife or minor children*." By St. 1868, c. 95, "no person shall be adjudged a trustee by reason of any money or credits in his hands, due for the wages of the personal labor or services of the wife or minor children of the defendant in trustee process."

SECT. 30. "*The identity of the defendant*." See *Wallace v. Lowell Institution for Savings*, 7 Gray 134.

SECT. 31. *Second Clause*. See notes on the third clause of this section.

*Third Clause*. "It has been decided that no person deriving

his authority from the law, and obliged to execute it according to the rules of law, can be held by the trustee process, except so far as he is expressly made liable by statute." *Thayer v. Tyler*, 5 Allen 94. See also *Webster v. Lowell*, 2 Allen 123. Thus a guardian cannot be adjudged a trustee for the debts of his ward. *Gassett v. Grout*, 4 Met. 486, 490. An assignee under the state insolvent laws cannot be charged as the trustee of a creditor of the insolvent, until after the dividend is declared. *Colby v. Coates*, 6 Cush. 558. See also *Thayer v. Tyler*, 5 Allen 94. — Gen. St. c. 142, s. 23.

An officer is not liable to a creditor of a person arrested by him on a criminal warrant, as trustee for money or other property taken by him under color of his official duty from the person of his prisoner, and for which he has given the latter a receipt. *Robinson v. Howard*, 7 Cush. 257. See also *Morris v. Penniman*, 14 Gray 220.

*Fourth Clause.* "Without depending on any contingency." The wages of a sailor are not attachable, unless the vessel has arrived at some port of unlading. *Wentworth v. Whittemore*, 1 Mass. 471.

Where A. gave his note in payment for goods purchased by B. through a broker, and took the goods to sell on commission as security for his liability, and after he had sold them at a profit, but before he had received payment for them, B. was summoned as a trustee of the broker, who was to have part of the net profits, it was held that he was not chargeable, it being contingent whether any net profits would ever come into his hands. *Williams v. Marston*, 5 Pick. 65.

One who has received the bill of lading and invoice of goods consigned to him, cannot be charged as the trustee of the consignor, until the goods have arrived and he has accepted the consignment. *Grant v. Shaw*, 16 Mass. 341.

A lessee who has covenanted to pay rent quarterly, can be held as trustee of his lessor for so many quarters' rent only as were due at the time he was summoned. *Wood v. Partridge*, 11 Mass. 488.

So it has been held that a city cannot be charged, upon a process served upon it in the middle of a quarter, for a proportionate part of the salary, paid quarterly, of a teacher of a public school. *Hadley v. Peabody*, 13 Gray 200.

So, also, where the salary of a minister was payable quarterly, and he tendered his resignation in the middle of a quarter, which resignation the parish afterwards accepted, and at the same time voted to pay him pro rata for his services after the commencement of the term, it was held that the parish were not chargeable as trustees of the minister in a process served after his resignation, but before the passage of the vote, such vote not operating as a waiver of the entirety of the contract. *Wyman v. Hichborn*, 6 Cush. 264.

For other cases in which it has been held that the person summoned as trustee was not chargeable, for the reason that the debt depended on some contingency, see *Davis v. Ham*, 3 Mass. 33. — *Andrews v. Ludlow*, 5 Pick. 28, 31. — *Faulkner v. Waters*, 11 Pick. 473, 474. — *Tucker v. Clisby*, 12 Pick. 22. — *Gassett v. Grout*, 4 Met. 486, 491. — *Greenway v. Wilmarth*, 12 Met. 12. — *Bennett v. Caswell*, 7 Gray 153.

Where a person summoned as trustee had in his hands at the time of service property, the title to which, being in controversy between the principal defendant and a third person, had been submitted to referees, who during the pendency of the process awarded in favor of the principal defendant, it was held that the trustee was chargeable. In this case it was said by PARKER, C. J., that "the contingency must affect the property itself, or the debt which is supposed to exist, and not merely the title to the property in the possession of the trustee, or his liability on a contract which he has actually made, but the force or effect of which is in litigation." *Thorndike v. De Wolf*, 6 Pick. 120, 122.

On a promise to pay a certain sum on a certain day in each year, as long as the promisee should live, and at the same rate for any part of a year, it was held that the promisor might be

charged as trustee of the promisee for that proportion of a yearly payment, which the portion of the year that had elapsed, when the writ was served, bore to the whole year. *Sabin v. Cooper*, 15 Gray 532.

A bank was held chargeable as trustee for another bank, whose money it held on deposit, subject to be withdrawn fifteen days after notice, although such notice had not been given. *Clapp v. Hancock Bank*, 1 Allen 394.

*Fifth Clause.* See *Sabin v. Cooper*, 15 Gray 532. — *Sharp v. Clark*, 2 Mass. 91.

As to whether the mere commencement of a suit against a debtor will render him exempt from liability as trustee, see *Howell v. Freeman*, 3 Mass. 121. — *Thorndike v. De Wolf*, 6 Pick. 120, 123. — *Thayer v. Southwick*, 8 Gray 229.

*Additional exemptions.* Allotment money of Massachusetts volunteers in the United States service is not subject to attachment by trustee process. St. 1862, c. 62, s. 1.

Pension money due from the United States is not liable to be attached by trustee process, while in course of transmission. St. U. S. 1866, c. 106. — *Kellogg v. Waite*, 12 Allen 529.

"No person shall be adjudged a trustee by reason of any money or credits in his hands, due for the wages of the personal labor or services of the wife or minor children of the defendant in the trustee process." St. 1868, c. 95. See also notes on section 21.

*Judgment, Execution, and Scire Facias.*

In a case where two trustee processes were served at the same time, and judgment was recovered in each for a sum greater than the amount in the hands of the trustee, it was held that each of the creditors was entitled to one-half of the funds, although their several judgments were for unequal amounts. *Davis v. Davis*, 2 Cush. 111.

SECT. 33. "*By force of the execution.*" As to the effect of these words, and the reason for their insertion in the statute, see *Burnap v. Campbell*, 6 Gray 241, 243.

SECT. 35. "*Before they are demanded of the trustee by the officer.*" The demand must be "by force of the execution." *Burnap v. Campbell*, 6 Gray 241, 242.

SECT. 37. The judgment was held to discharge the trustee, as provided by this section, where the case and the parties were within the general jurisdiction of the court, and the officer's return showed on its face a proper service, although the principal defendant was not actually served with notice and did not appear. But quære as to what would be the effect upon the rights of a trustee, if, upon a writ of error or review, the judgment against the principal defendant should be reversed. *Morrison v. New Bedford Institution for Savings*, 7 Gray 269. — *Wheeler v. Aldrich*, 13 Gray 51. So a trustee was held to be discharged, although the property in his hands was by statute exempt from attachment, and the judgment against him was consequently erroneous. *Webster v. Lowell*, 2 Allen 123. Where, however, the court had no jurisdiction of the original suit, it having been commenced after the death of the person named as the principal defendant, it was held that a payment by the trustee, by force of the judgment in such suit, was no bar to a suit against him by the administrator of the deceased. *Loring v. Folger*, 7 Gray 505, 506.

SECT. 39. "*Upon demand.*" A demand upon the president of a railroad corporation, which had been adjudged a trustee, was held to be sufficient. *Bickford v. Boston & Lowell R.R. Corporation*, 21 Pick. 109.

"*The plaintiff may sue out a writ of scire facias.*" Scire facias will lie against one who is adjudged a trustee, notwithstanding the death of the principal defendant after judgment against him, provided his estate is not represented insolvent. *Patterson v. Patten*, 4 Mass. 473.

The fact, that the principal defendant was committed on execution after the demand upon the trustee, has been held not to affect the trustee's liability on scire facias. *Cheney v. Whitely*, 9 Cush. 289.

A writ of scire facias cannot be lawfully issued against a trustee before his default is shown by the officer's return on the execution against him, nor will a return of the execution before the return day authorize the issuing of such writ. *Adams v. Cummiskey*, 4 Cush. 420. — *Patterson v. Buckminster*, 14 Mass. 144.

A plaintiff is not entitled, as of right, to litigate anew on scire facias the sum for which the trustee should be charged, if that question has been tried and determined in the original suit, and the amount paid, for which the trustee was there held chargeable. *Brown v. Tweed*, 2 Allen 566. See also section 42.

"*Or a separate writ against each of the trustees.*" Where the trustees are liable jointly, they should be joined in one writ. *Hathaway v. Russell*, 16 Mass. 473, 475.

SECT. 42. "*He shall be permitted to answer and prove,*" &c. A trustee may object that judgment was rendered in the original action at the first term against the principal defendant, who was not in the state at the time of service, and that the further notice required by statute in such cases was not given. *Thayer v. Tyler*, 10 Gray 164.

Although a person summoned as trustee of a firm has appeared and been charged upon his answer, scire facias will not lie against him, if the judgment against the principal defendants is invalid for want of service upon one of them. *Pratt v. Cunliff*, 9 Allen 90.

The trustee cannot on scire facias for the first time plead matters which might have been pleaded in abatement to the original suit. *Hoyt v. Robinson*, 10 Gray 371.

Further as to what defence the trustee may make in the suit on scire facias, see *Burnside v. Newton*, 1 Met. 426, 427. — *Thayer v. Tyler*, 10 Gray 164, 169. — *Hoyt v. Robinson*, 10 Gray 371. — *Pratt v. Cunliff*, 9 Allen 90.

"*Upon the whole matter appearing upon such examination and trial the court shall render such judgment as law and justice may require.*" This provision extends as well to costs, as



to charging or discharging the trustee, and the question of costs does not depend entirely upon the fact whether the trustee is charged or not, but it depends upon a full view of the equities and justice of the case. *Thompson v. Lowell Machine Shop*, 4 Cush. 431.

SECT. 43. A debtor, retaining in his hands funds for which he has been charged as trustee of his creditor, is liable therefor to the creditor after the time, within which scire facias could be commenced against him, has expired. Where the time expired pending exceptions taken by the debtor to a verdict in favor of the creditor in an action to recover such funds, the court, having overruled the exceptions, caused judgment to be entered on the verdict. *Fuller v. Rice*, 4 Gray 343.

*Proceedings when Trustee has Specific Goods.*

SECT. 54. For an exposition of the mischiefs proposed to be remedied by this section, see *Jewett v. Bacon*, 6 Mass. 60.

"*Within the state.*" See *Clark v. Brewer*, 6 Gray 320.

SECT. 55. In a case in which a debtor, who had been arrested, put property in the hands of his bail to secure him for his liability on his bail bond, and the bail was then summoned as trustee in a trustee process brought against the debtor by another creditor, it was held that the plaintiff in such trustee process was entitled to have the liability of the trustee determined in that process, although it appeared that the trustee had been sued on the bail bond. *Hooton v. Gamage*, 11 Allen 354.

*Costs.*

SECT. 60. "*Costs for travel and term fees,*" &c. Such costs will be allowed until the trustee is charged or discharged. *Morrison v. McDermott*, 6 Allen 122. — *Croxford v. Massachusetts Cotton Mills*, 15 Gray 70. — *Holbrook v. Waters*, 19 Pick. 354.

Where one who was charged as trustee in the superior court, appealed to the supreme court, and was charged there also, it was held that he was not entitled to any costs on his appeal. *Ball v. Gilbert*, 12 Met. 397.

Where several are summoned as copartners, they are entitled to only one bill of costs. *Gerry v. Gerry*, 10 Allen 160.

SECT. 61. "*His costs and charges shall be deducted and retained,*" &c. The trustee can retain only such sum as may be allowed by the court. If that taxation is erroneous, it may be appealed from, but the question cannot be raised in a suit brought against the trustee by the principal debtor for the balance in the trustee's hands. *McLaughlin v. Western R.R. Corporation*, 12 Cush. 131.

"*He shall have judgment and execution against the plaintiff.*" If the trustee appears by his answers to be chargeable for a less amount than his costs, as taxed, he will, upon motion and without waiting for scire facias against him, be entitled to have the court decide whether the goods in his hands are actually insufficient to pay such costs, and, if they are, to have judgment and execution for the balance. *Miller v. Carrier*, 11 Gray 19.

SECT. 62. A supposed trustee who, after filing his answers as such, became insolvent and obtained his discharge, and who afterwards was discharged as trustee on his answers, was held to be entitled to his costs. *Penniman v. Mathews*, 3 Cush. 341.

SECT. 73. The exercise of the discretion given to the court by this section only extends to the determination of the question whether the trustees' costs are to be paid by the plaintiff or by the claimant, and it does not extend to the question of the right of the trustee to receive costs. *Morrison v. McDermott*, 6 Allen 122.

*Trustee Process before Justices of the Peace, &c.*

SECT. 79. See notes on Gen. St. c. 142, s. 11.

SECT. 80. See Gen. St. c. 142, ss. 9, 11.

## CHAPTER CXLIII.

## OF REPLEVIN OF PROPERTY.

*Replevin of Cattle Distrained.*

SECT. 4. See notes to section 12.

SECT. 5. The provision contained in this section for the return of the bond to the justice or court is merely directory, and a strict compliance with it is not necessary to the validity of the bond. *Smith v. Whiting*, 97 Mass. 316.

As to the proper form of the officer's return, see *Wolcott v. Mead*, 12 Met. 516.

*Replevin of other Property.*

SECT. 10. "*When any goods,*" &c. This and the following sections were not intended to apply to those cases of cattle distrained, which are specifically provided for in sections 1-9. *Sackett v. Kellogg*, 2 Cush. 88, 90.

"*Exceeding in value twenty dollars.*" The jurisdiction of actions of replevin depends, not upon the allegations of the writ as to the value of the goods, nor upon the estimate of the appraisers, but upon *their actual value at the time of suing out the writ*. *Davenport v. Burke*, 9 Allen 116, 117. — *King v. Dewey*, 11 Cush. 218.

"*By a person other than the defendant,*" &c. See *Perry v. Richardson*, 9 Gray 216.

SECT. 11. *Form of writ.* The writ need not, except perhaps when it is to be served by a constable, allege the value of the goods to be replevied. *Pomeroy v. Trimper*, 8 Allen 398, 402.

SECT. 12. If a proper bond be not given pursuant to this section, the officer serving the writ will be liable as a trespasser. *Dearborn v. Kelley*, 3 Allen 426.

"*From the plaintiff, or some one in his behalf, a bond to the defendant with sufficient sureties.*" A bond from a person not

the plaintiff, with one surety, is not such a bond. *Clafin v. Thayer*, 13 Gray 459. But the defendant must raise such objection at the return term. *Wolcott v. Mead*, 12 Met. 516, 518.

*"In double the value of the goods."* The penal sum must be expressed in dollars. *Clark v. Conn. River R.R.*, 6 Gray 363. — *Case v. Pettee*, 5 Gray 27.

*"The officer shall proceed in the appraisal of the goods," &c.* Such appraisal is not evidence of the value of the goods in favor of the defendant in an action brought by him upon the replevin bond, he having obtained a judgment for a return in the original suit. *Kafer v. Harlow*, 5 Allen 348.

*"The bond shall be left with the clerk," &c.* See note to section 5.

SECT. 13. *"Or otherwise."* The court may order a return of goods replevied, if the plaintiff for any cause fails to sustain his action. *Lowe v. Brigham*, 3 Allen 429. — *Johnson v. Neale*, 6 Allen 227, 229. — *Stanley v. Neale*, 98 Mass. 843.

If an action of replevin is defeated solely by reason of its being prematurely commenced, judgment for a return will not be ordered. *Martin v. Bayley*, 1 Allen 381.

*"With damages for the taking."* As to the measure of damages in certain peculiar cases, see *Bartlett v. Brickett*, 14 Allen 62. — *Davis v. Harding*, 3 Allen 302. — *Bartlett v. Kidder*, 14 Gray 449. — *Leighton v. Brown*, 98 Mass. 515.

SECT. 17. The plaintiff will not be entitled to judgment upon showing that, since the commencement of the action, the defendant has gone into insolvency, and an assignee has been appointed, who does not appear and take upon himself the defence of the action. *Hallett v. Fowler*, 8 Allen 93.

## CHAPTER CXLIV.

## OF HABEAS CORPUS, PERSONAL REPLEVIN, AND PERSONAL LIBERTY.

*Habeas Corpus.*

Nothing in the statutes shall authorize taking prisoners by habeas corpus out of the custody of the United States marshal or his deputy, provided, &c. St. 1861, c. 91, s. 3.

Soldiers who receive bounty money, &c., not to be discharged on habeas corpus until such money, &c., has been refunded. St. 1863, c. 154.

SECT. 2. *Second Clause.* For a case arising under this clause, see Feeley's case, 12 Cush. 598.

SECT. 5. Writs of habeas corpus in all cases, except in those mentioned in sections 30 and 32 of this chapter, "shall be returnable before the supreme judicial court, or some justice thereof, in term time or vacation." St. 1861, c. 91, s. 1.

SECT. 19. When any trial is had under this section, "issues shall be framed under the direction of the court, and the rules of evidence, procedure, and decision shall be those of the common law." St. 1861, c. 91, s. 2.

SECT. 21. See note to section 19.

SECT. 28. To the discharge of a prisoner on habeas corpus by a single judge, exceptions do not lie. *Wyeth v. Richardson*, 10 Gray 240.

SECT. 30. As to the bailing of prisoners in Suffolk county, see St. 1862, c. 159.

*Personal Liberty.*

SECTS. 58-66. These sections repealed by St. 1868, c. 24, s. 2. (Sections 68 and 64 had previously been modified by St. 1861, c. 91, ss. 4 and 5.)

SECT. 67. This section repealed and superseded by St. 1868, c. 24, which provides, that "no person holding a judicial office under the laws of the United States shall hold any

judicial office under the constitution and laws of this state, except those of trial justice and justice of the peace.”

By St. 1867, c. 357, s. 2, a similar provision was made, forbidding registers of bankruptcy under the laws of the United States to hold certain offices under the laws of this state.

## CHAPTER CXLV.

### OF AUDITA QUERELA, CERTIORARI, MANDAMUS, AND QUO WARRANTO.

#### *Audita Querela.*

As to the cases in which a party will be entitled to a writ of audita querela, see *Barker v. Walsh*, 14 Allen 172, 175. — *Stone v. Chamberlain*, 7 Gray 206.

Audita querela will not lie to discharge from arrest one who has had time to take advantage of the matter which discharges him, but has neglected it. *Faxon v. Baxter*, 11 Cush. 35, 36.

#### *Certiorari.*

“The writ of certiorari is given to prevent manifest injustice, and not to enable a party to avoid the proceedings of an inferior tribunal for technical errors. The petition is addressed to the sound discretion of the court; and even when formal errors exist, the writ will be refused, if no wrong or substantial injury is occasioned thereby to the petitioner.” Per *WELLS, J.*, in *Pickford v. Lynn*, 98 Mass. 491, 496.

With regard to the cases in which the court will grant writs of certiorari, see also *Mendon v. County Commissioners of Worcester*, 2 Allen 463. — *Stone v. Boston*, 2 Met. 220.

When the certificate of an inferior court or magistrate is brought before the supreme court on certiorari, evidence may be received to support the record by showing that substantial justice was done in the matter, and that formal errors or defects in the proceedings did not essentially affect the rights of the

parties ; but in other respects the certificate will be conclusive, and parties will not be permitted to offer evidence to control or contradict it, or to prove facts outside of those certified, for the purpose of reversing the judgment or decree, or correcting errors in the proceedings. *Mendon v. County Commissioners of Worcester*, 5 Allen 13, 16.

SECT. 9. Under this section the court may vacate irregular proceedings by county commissioners, and order further proceedings by them to correct the irregularity. *Lowell v. County Commissioners of Middlesex*, 6 Allen 131.

*Quo Warranto.*

SECT. 16. The fact that a party is entitled, under this section, to apply for a quo warranto, does not deprive him of his remedy by bill in equity in case of a private nuisance. *Fall River Iron Works v. Old Colony & Fall River R.R.*, 5 Allen 221, 225.

## CHAPTER CXLVI.

### OF WRITS OF ERROR AND REVIEW.

*Writs of Error.*

A writ of error will not lie to a judge of probate, as to any decree or judgment rendered by him in the exercise of his ordinary jurisdiction, for the reason that proceedings before him are not usually according to the course of the common law. But where the proceedings before a judge of probate, as in the case of those under Gen. St. c. 76, s. 21, relating to the commitment of boys to the State Reform School, are strictly according to the course of the common law, a writ of error will lie. *Fitzgerald v. Commonwealth*, 5 Allen 509, 511.

SECT. 2. "*For the same county.*" The court cannot take cognizance of a writ of error brought in any other county. *Ide v. Cleworth*, 10 Cush. 415.

SECT. 16. This provision seems to have been enacted by reason of the decision in *Shepherd v. Commonwealth*, 2 Met. 419.

*Writs of Review.*

As to the right of persons against whom judgment has been rendered upon default, while they were absent from the State in the military or naval service of the United States, to sue out a writ of review, see St. 1862, c. 188, s. 2.

SECT. 19. "*In civil actions.*" These do not include libels for divorce. *Lucas v. Lucas*, 3 Gray 136, 138.

SECT. 20. See *Smith v. Paige*, 4 Allen 94. — *Bodurtha v. Goodrich*, 3 Gray 508.

SECT. 21. For cases of writs of review granted under this section, see *Hutchinson v. Gurley*, 8 Allen 23. — *Anderson v. Brown*, 10 Gray 92. — *Bowditch Mutual Fire Insurance Co. v. Winslow*, 3 Gray 415, 420.

As to the cases in which the court should refuse to grant writs of review under this section, see *Converse v. Carter*, 8 Allen 568.

SECT. 32. See *Whitton v. Bicknell*, 3 Allen 472.

SECT. 34. See *Brown v. Brigham*, 5 Allen 582, 584.

SECT. 38. As to the proper form of the bond to be given under this section, see *Green v. French*, 1 Allen 265. — *Randall v. Bancroft*, 10 Allen 346.

"*With condition that he will forthwith prosecute a review to final judgment,*" &c. Such condition will be broken, if the petition for review is dismissed. *Randall v. Bancroft*, 10 Allen 346. A party will be deemed to have satisfied the condition to prosecute "*forthwith,*" if he does so within such time as the court having jurisdiction of the petition may order. *Bamforth v. Raddin*, 14 Allen 66, 67.



## CHAPTER CXLVII.

## OF REFERENCE TO ARBITRATION BY AGREEMENT BEFORE A JUSTICE OF THE PEACE.

SECT. 1. "*All controversies which might be the subject of a personal action at law or suit in equity.*" Arbitrators appointed under this chapter have no jurisdiction of questions concerning the title to real estate. *Fowler v. Bigelow*, 8 Mass. 1.

A claim for which the only remedy is a peculiar one provided by statute, as in the case of a claim for damages for flowing land under Gen. St. c. 149, cannot be submitted to arbitration under this chapter. *Henderson v. Adams*, 5 Cush. 610, 612. — *Carpenter v. Cushman*, 2 Gray 407.

The question how much a lessor shall pay a lessee for the surrender of his lease at a future day, cannot be referred under this chapter. *Hubbell v. Bissell*, 13 Gray 298.

SECT. 2. *Form of submission.* A submission, to which a partnership is one party, must show who are the members of the firm. *Wesson v. Newton*, 10 Cush. 114.

All the parties to the submission must sign and acknowledge it, and one member of a partnership cannot sign and acknowledge a submission in behalf of the firm. *Abbott v. Dexter*, 6 Cush. 108. — *Horton v. Wilde*, 8 Gray 425.

An arbitrator, who is a justice of the peace, may take the acknowledgment provided for in this section. St. 1863, c. 157, s. 2. Prior to this statute it was held that a submission acknowledged before an arbitrator was void. *Heath v. Tenney*, 3 Gray 380. — *Drew v. Canady*, 1 Mass. 158. — *Deerfield v. Arms*, 20 Pick. 480, 481.

As to the county in which the submission should provide that the award shall be returned, see *Sperry v. Ricker*, 4 Allen 17, 19.

SECT. 3. "*Such as might be the subject of a personal action,*" &c. See notes to section 1.

SECT. 5. "*May be varied according to the agreement of the parties.*" Such agreement, if merely oral, will not be sufficient: — *it seems* that, if made subsequently to the submission, the agreement must be in writing, signed and acknowledged in the same manner as the submission. *Burghardt v. Owen*, 13 Gray 300, 302.

"*Unless made upon a recommitment.*" There is no time limited for the return of an award which has been recommitted. *Sperry v. Ricker*, 4 Allen 17, 18.

SECT. 9. The award must, within the time limited in the submission, be returned to the court at some term or session thereof, and not merely filed in the office of the clerk of the court. *Burghardt v. Owen*, 13 Gray 300.

The award may be returned at a term commenced before the award was made. *Skeets v. Chickering*, 7 Met. 316, 318.

It seems that the original submission should be returned with the award. *Eaton v. Hall*, 5 Met. 287.

SECT. 10. As to the extent to which mistakes of law or of fact afford a ground for setting aside an award, see *Fairchild v. Adams*, 11 Cush. 549.

As to improper conduct in the arbitrators in prejudging the case, see *Conrad v. Massasoit Insurance Co.*, 4 Allen 20.

"*Or recommit it to the same arbitrators for a rehearing.*" The power of recommitment is not limited to the purpose of a rehearing. An award may also be recommitted for amendment in matter of form, or for any other sufficient cause. *Blood v. Robinson*, 1 Cush. 389.

The award must be such that a judgment, which can be enforced by the superior court, can be rendered upon it. It will be invalid, for instance, if it require the transfer of a specific article of personal property. *Brown v. Evans*, 6 Allen 333.

## CHAPTER CXLVIII.

## OF IMPROVING MEADOWS AND SWAMPS.

SECT. 2. "*To the superior court.*" Concurrent jurisdiction given to the probate court in Duke's county. St. 1869, c. 387.

*Construction of Roads, &c., to Swamps, &c.*

Under these provisions county commissioners have no power to authorize an owner of marshy or wet land to dig a ditch into his neighbor's land and discharge the water upon the same to his injury, but only to authorize him to dig a ditch across the same to some outlet where the water may be discharged without injury. *Sherman v. Tobey*, 8 Allen 7.

## CHAPTER CXLIX.

## OF THE SUPPORT AND REGULATION OF MILLS.

For a consideration of the general purpose of this chapter, see *Brigham v. Wheeler*, 12 Allen 89.

As to the nature of the rights acquired by a mill-owner in the lands flowed by his dam, see *Storm v. Manchaug Co.*, 13 Allen 10.

Owners and lessees of *cranberry lands* may erect and maintain dams according to the provisions of this chapter. St. 1866, c. 206.

*Reservoir companies* incorporated in this state may flow lands of other persons by their reservoir dams, and persons injured may obtain compensation in the manner provided in this chapter and in the acts in addition thereto. St. 1869, c. 383.

The provisions of this chapter do not apply to *tide mills*. *Murdock v. Stickney*, 8 Cush. 113.

They do apply to a reservoir dam built across the outlet of a

pond for the use and supply of mills upon the stream into which the pond naturally flows. *Shaw v. Wells*, 5 Cush. 537.

But they do not apply to a reservoir dam built upon one stream for the purpose of supplying water to mills on another stream, with which the former has no natural connection except below such mills. *Bates v. Weymouth Iron Co.*, 8 Cush. 548, 553.

When a mill-dam flows the cellar of a dwelling-house and renders it unhealthy, the owner of such house has no remedy except according to the provisions of this chapter. *McNally v. Smith*, 12 Allen 455.

The *efficient*, not the *actual*, height of a dam determines the rights of the parties under this chapter. *Ray v. Fletcher*, 12 Cush. 200, 208.

*Erection and Regulation of Mills.*

SECT. 2. "*No such dam shall be erected to the injury of any mill.*" The "injury" here referred to does not include such as may be caused by unusual freshets and other extraordinary causes. *Smith v. Agawam Canal Co.*, 2 Allen 355.

"*Nor shall any mill-dam be hereafter erected or raised to the injury of any such mill-site which has been occupied as such,*" &c. As to the purpose and effect of this provision, see *Storm v. Manchaug Co.*, 13 Allen 10, 15.

SECT. 4. The party having the record title to the land on which a dam is built, will be liable under this section, although he may have conveyed away his estate by a deed not recorded, and of which the party injured has no notice. *Hennessey v. Andrews*, 6 Cush. 170. And the owner of land will be responsible for damages caused by a dam built by his lessee for years. *Sampson v. Bradford*, 6 Cush. 303.

"*A person whose land is overflowed or otherwise injured by such dam.*" This clause refers solely to injuries caused by the overflowing of lands by raising a head of water by the building of a dam, and to the incidental and consequential damages which necessarily and naturally arise therefrom, and not to

those injuries which are not the usual, ordinary, or necessary result of the building of the dam, as, for instance, those caused to the owner of land below the dam by preventing the water from flowing in its usual channel. *Thompson v. Moore*, 2 Allen 350.

*"Upon his complaint to the superior court."* Such complaint is not removable to the supreme court upon affidavit according to Gen. St. c. 114, ss. 3, 7, and 8. *Humphrey v. Berkshire Woollen Co.*, 10 Allen 420.

SECT. 8. See *Howard v. Prop's of Locks and Canals*, 12 Cush. 259, 262.

SECT. 9. See *Tyler v. Mather*, 9 Gray 177, 182.

SECT. 17. The only judgment which can be rendered for the respondent, in the case provided for in this section, is for costs. *Fisher v. Johnson*, 2 Allen 436, 437.

SECT. 19. After the height of a dam is fixed, as provided in this section, if such height is not observed, a party injured may have a remedy by an action of tort, or, at least after his right has been established at law, by a bill in equity. *Hill v. Sayles*, 12 Cush. 454.

SECT. 29. *"Or the manner of using the water."* See *Stetson v. E. Carver Co.*, 97 Mass. 402.

SECT. 31. This section "is to be interpreted in reference to all the other provisions of the chapter, with due regard to its whole scope and purpose, and there can be no doubt that the dams protected by it are only those which are by statute authorized to be erected and maintained." *Brigham v. Wheeler*, 12 Allen 89, 90.

SECT. 32. The respondent will be entitled to costs as the prevailing party, when the verdict is that the complainant is entitled to no damages, although it is also a part of the verdict that the dam shall be left open during a part of the year. *Fisher v. Johnson*, 2 Allen 436, 437.

SECT. 34. As to the proper form of a complaint under this section, see *Ray v. Fletcher*, 12 Cush. 200.

SECT. 42. A tender under this section is a technical admission of every thing which the complainant might otherwise have been compelled to prove in order to entitle himself to a warrant for a jury to assess damages. After the tender, the only question open will be as to the amount of damages. *Hosmer v. Warner*, 7 Gray 186.

SECT. 46. See *Tyler v. Mather*, 9 Gray 177, 181.

## CHAPTER OL.

### OF LIENS ON BUILDINGS AND LAND.

As to the question whether a party having a lien under this chapter will waive it by taking a note for the amount due, see *Green v. Fox*, 7 Allen 83.

Partners and joint creditors must, under this chapter, give joint notices, bring joint petitions, and in all their proceedings act jointly. *Rockwood v. Walcott*, 3 Allen 458.

SECT. 1. If labor and materials are furnished under an entire contract, there can be no lien for the one without the other, if the contract fixes a price without apportioning it; otherwise, if the price is apportioned, or none is fixed. *Clark v. Kingsley*, 8 Allen, 543. — *Graves v. Bemis*, 8 Allen 573. — *Felton v. Minot*, 7 Allen 412. — *Mulvey v. Barrow*, 11 Allen 152. — *Morrison v. Minot*, 5 Allen 403.

A party who, without any knowledge of the use to be made of it, saws lumber at his mill for one who is erecting a building on the land of another, is not entitled to any lien on such building. *Bennett v. Shackford*, 11 Allen 444.

For a case where labor and materials were furnished under an entire contract for the erection of a fence upon the land of several different owners, see *Rathburn v. Hayward*, 5 Allen 406.

“*Building or structure.*” As to the meaning of these words, see *Treadwell v. Gay*, 13 Gray 311, 312.

“*By consent of.*” As to what constitutes sufficient evidence

of such consent, see *Peabody v. Eastern Methodist Soc. of Lynn*, 3 Allen 540, 542.

*"The owner of such building."* It seems that one who has only a bond for a deed of the land on which such building is situated, is not such owner. *Metcalf v. Hunnewell*, 1 Gray 297, 298.

*"Any person having authority from such owner."* See *Morse v. School District in Newbury*, 3 Gray 307, 308.

SECT. 2. *"If such owner is not the purchaser."* As to the meaning of the word "purchaser," see *Whitford v. Newell*, 2 Allen 424, 426.

SECT. 3. *"Recorded prior to the date of the contract."* From section 33 it would seem that a lien would not be valid as against a mortgage recorded *prior to the recording of the statement* required by section 5, though subsequently to the date of the contract. See section 33, and note to the same.

As to the rights of a mortgagee who takes a title subject to a prior mechanic's lien, see *Howard v. Robinson*, 5 Cush. 119, 124.

SECT. 5. *"Within thirty days after he ceases to labor."* If, after a contract for building a house has been substantially performed, and a bill rendered for work done under the same, further work is done which the proper performance of the contract calls for, and not for the purpose of fixing a later date from which to compute the thirty days mentioned in this section, the time of ceasing such further labor may be taken as such date. *Hubbard v. Brown*, 8 Allen 590, 594.

*"Together with a description of the property intended to be covered by the lien."* As to what will be a sufficient description, see *Parker v. Bell*, 7 Gray 429, 433.

SECT. 6. For cases in which it has been held that errors and inaccuracies in the statement of the account did not invalidate the proceedings, see *Hubbard v. Brown*, 8 Allen 590, 593.—*Underwood v. Walcott*, 3 Allen 464.—*Whitford v. Newell*, 2 Allen 424, 427.—*Parker v. Bell*, 7 Gray 429,

433. For a case in which the statement was held to be wholly insufficient, see *Lewin v. Whitten*, 13 Gray 100, 102.

SECT. 10. When the petition is inserted in a writ, pursuant to this section, the making of the writ is to be deemed the commencement of the suit. *Spofford v. Huse*, 9 Allen 575.

SECT. 11. As to the proper form of the petition, see *Simpson v. Dalrymple*, 11 Cush. 308. — *Parker v. Bell*, 7 Gray 429, 433.

“*With a description of the premises,*” &c. A description will be sufficient, if it points out and indicates the premises so that, by applying the description to the land, it can be found and identified. *Parker v. Bell*, 7 Gray 429, 434.

SECT. 14. “*To the owner of the building or structure.*” As to who is entitled to notice as such “owner,” see *Howard v. Robinson*, 5 Cush. 119, 122, 123.

This section does not require that the notice referred to in it should be ordered or given at any particular term of court. *Rockwood v. Walcott*, 3 Allen 458, 461.

SECT. 16. As to the meaning of this section, see *Howard v. Robinson*, 5 Cush. 119, 124.

SECT. 28. This section is so far amended “that the attaching creditor shall be preferred only to the extent of the value of the buildings and land, as they were when the labor was commenced, or the materials furnished for which the lien is claimed.” St. 1861, c. 131.

SECT. 33. “*If the property at the time of recording the statement is mortgaged.*” By section 3 it would seem that a mortgage, in order to obtain priority over mechanics’ liens, must be recorded prior to the date of the contract under which the lien is claimed. It is to be noted, however, that under the present laws there may be a valid lien, though there has been no contract other than an implied one, which could not properly be said to have any date. In the case of *Mulvey v. Barrow*, 11 Allen 152, 154, in which a mortgage had been recorded prior to the recording of the statement, but subsequently to the



performing of the labor for which a lien was claimed, it was distinctly stated by the court, that such lien attached only to the equity of redemption. It does not appear, however, that there had been in this case any dispute upon this point, or that the equity was not of itself sufficient in value to satisfy the lien.

SECT. 34. "*Or whoever holds the estate or interest which he had in the premises.*" See *Howard v. Robinson*, 5 Gray 119, 123.

## CHAPTER CLI.

### OF MORTGAGES, PLEDGES, AND LIENS UPON PERSONAL PROPERTY.

#### *Mortgages of Personal Property.*

SECT. 1. This section has been held not to apply to a mortgage made out of the state, though made by a citizen of this state, when temporarily in another state with the property mortgaged, and who, after executing the mortgage, immediately returned with the property to this state, and the same remained here in his possession. *Langworth v. Lane*, 12 Cush. 109.

This section applies to mortgages made by the execution of an absolute bill of sale and a separate instrument of defeasance. *Potter v. Boston Locomotive Works*, 12 Gray 154, 158.

It seems that the recording of a mortgage of personal property, which the mortgagor does not own at the time when the mortgage is made, but subsequently acquires, is of no effect. *Jones v. Richardson*, 10 Met. 481, 493.

An *assignment* or *release* of a mortgage of personal property is not required to be recorded. *Bigelow v. Smith*, 2 Allen 264, 265.

"The time when the record must be made is not specially prescribed, though it must undoubtedly precede the possession by others subsequently acquiring an interest in the mortgaged property. To prevent it from passing to them it will be suffi-

cient that the record is made at any time before such possession is taken, though it be long after the execution of the mortgage." Per MERRICK, J., in *Mitchell v. Black*, 6 Gray 100, 106.

"*Mortgages of personal property.*" By "personal property" is meant only goods and chattels capable of delivery, and it is not necessary that a mortgage of a chose in action should be recorded. *Marsh v. Woodbury*, 1 Met. 436.

"*Or the property mortgaged is delivered to and retained by the mortgagee.*" As to what constitutes a sufficient delivery to and retention by the mortgagee, see *Carpenter v. Snelling*, 97 Mass. 452, 456.

Delivery to and retention by an *agent* of the mortgagee will be equally as effectual as delivery to and retention by the mortgagee himself. *McPartland v. Read*, 11 Allen 231.

"*Shall not be valid against any person other than the parties thereto.*" The assignee in insolvency of the mortgagor is not to be regarded as one of such "parties." *Brigham v. Jordan*, 1 Allen 373.

The fact that a subsequent purchaser or attaching creditor has notice of the existence of an unrecorded mortgage will not make the mortgage good as against him. *Travis v. Bishop*, 13 Met. 304. But quære as to the case of an attaching creditor, though there seems to be no good ground for any distinction between him and a purchaser. See *Shapleigh v. Wentworth*, 13 Met. 358, 362. — *Denny v. Lincoln*, 13 Met. 200, 202.

SECT. 2. Even if the statutes of this state had required the recording of mortgages of ships and vessels, which the laws of the United States require to be recorded, it would not be necessary to comply with the state law. The brig *Martha Washington* (U. S. Circuit Court, Maine Dist.), 25 Law Reporter 22.

A yacht of sixteen tons burden, kept for the use of visitors at a hotel, and not registered, enrolled, or licensed under the laws of the United States, is not to be considered a "ship or vessel" within the meaning of this section. *Veazie v. Somerby*, 5 Allen 280, 286.

SECT. 6. When a mortgage is given to secure a note payable on demand, such note being payable immediately, no demand will be necessary to constitute a breach of condition, and the mortgagee may, immediately after the mortgage is given and without making any demand whatever, give notice of his intention to foreclose. *Southwick v. Hapgood*, 10 Cush. 119, 121. — *Goodrich v. Willard*, 2 Gray 203, 204.

SECT. 7. This section does not require the recording of a notice of intention to foreclose a mortgage, which is itself valid without being recorded. Such notice must, however, be given according to the provisions of the preceding section. *Taber v. Hamlin*, 97 Mass. 489, 492.

SECT. 8. "*Within sixty days.*" A mortgage given by a party, who afterwards becomes insolvent, may, in certain cases, be redeemed by the assignee in insolvency after the sixty days. St. 1862, c. 179, s. 7.

*Pledges.*

As to the rights of a holder of collateral security, see *Fletcher v. Dickinson*, 7 Allen 23.

Act to enable banks to sell stock on which they have a lien. St. 1863, c. 174.

*Liens on Ships and Vessels.*

The courts of this state cannot enforce liens on vessels *on the high seas and public navigable waters* by proceedings in rem. See 2 Am. Law. Rev. 181, 238. — 3 Am. Law. Rev. 597, 603, 606. — *The Moses Taylor*, 4 Wallace 411. — *The Hine v. Trevor*, 4 Wallace 555.

The courts of the United States have jurisdiction to enforce liens under these provisions. *Hawes v. Mitchell*, 15 Gray 234, 235.

When a contractor fails to pay laborers on a vessel, the owner of the vessel may discharge their lien, and have the same claim against the contractor as if the lien had been enforced by judgment of court. St. 1862, c. 185.

If a vessel, after labor has been performed upon her, be in-

jured and sunk, and rendered of no value as a vessel, the lien for such labor will not thereby be destroyed as against one who purchases the hull and repairs it. *McMonagle v. Nolan*, 98 Mass. 320.

A lien upon a vessel under this chapter may exist, but it cannot be enforced, after such vessel has become the property of the United States. *Briggs v. A Light Boat*, 7 Allen 287. — s. c. 11 Allen 157.

SECT. 12. There will be no lien upon a vessel, under this section, for timber sold and delivered to its owner in another state. *Tyler v. Currier*, 13 Gray 134.

Nor will a vessel be subject to any lien for materials used in its construction, unless such materials were specifically furnished to be used upon that particular vessel. *Rogers v. Currier*, 13 Gray 129. — *Barstow v. Robinson*, 2 Allen 605, 606.

A vessel will, however, be subject to a lien for materials furnished for its construction, although they may never in fact be attached to it. *Barstow v. Robinson*, 2 Allen 605.

*"Ship or vessel."* These terms include a boat built and adapted to be used as a floating light. *Briggs v. A Light Boat*, 7 Allen 287, 298.

SECT. 13. The lien will be dissolved if a statement is not filed pursuant to this section, although an attachment of the vessel upon a petition to enforce the lien has been made before her departure from the port. *Hawes v. Mitchell*, 15 Gray 284, 235.

*"A just and true account."* See *Story v. Buffum*, 8 Allen 35, 37.

The statement need not show the kind or purpose of the work done. *McMonagle v. Nolan*, 98 Mass. 320.

*"The name of the owner of the ship or vessel, if known."* The knowledge here referred to is not absolute knowledge, but such as arises from information and belief. *Story v. Buffum*, 8 Allen 35, 37.

SECT. 15. *"A process of attachment."* Such attachment

does not resemble ordinary attachments on mesne process, and the provisions of chapter 128, section 73, relative to the sale of property attached, do not apply to it. *Coburn v. Clark*, 3 Allen 207, 208.

SECT. 16. As to the proper mode of taking objections to the sufficiency of the petition, see *McMonagle v. Nolan*, 98 Mass. 320, 321.

*Other Liens.*

SECT. 21. "*Whoever has a lien \* \* \* may apply by petition,*" &c. Such petition and the other proceedings for the enforcement of a lien must be brought in the name of the original party, although his claim may have been subsequently assigned. *Busfield v. Wheeler*, 14 Allen 139.

"*For money expended.*" This includes money expended for materials as well as for labor. *Busfield v. Wheeler*, 14 Allen 139.

"*By reason of any contract express or implied.*" It is not necessary that the contract under which the work, &c., is performed, &c., should be in writing, nor that any previous notice should be given to the owner of the property, or recorded in the town clerk's office. *Busfield v. Wheeler*, 14 Allen 139.

"*Demand in writing.*" As to the proper form of such demand, see *Busfield v. Wheeler*, 14 Allen 139.

"*To a justice of the peace or police court.*" The jurisdiction of such justice or police court is not limited by the amount of the claim or the value of the property. *Busfield v. Wheeler*, 14 Allen 139.

SECT. 29. A boarding-house keeper will be entitled to his lien upon the baggage and effects of his boarder for fare and board furnished after such baggage and effects have been sold, provided he has no notice of the sale. *Bagley v. Merrill*, 10 Allen 360.

## CHAPTER CLII.

## OF RECOGNIZANCES FOR DEBTS.

## CHAPTER CLIII.

## OF SEIZING AND LIBELLING FORFEITED GOODS.

SECT. 2. If the libel be not filed within the fourteen days pursuant to this section, the party seizing will be liable as a trespasser ab initio. *Russell v. Hanscomb*, 15 Gray 166.

---

## TITLE V.

## OF THE LIMITATION OF ACTIONS.

STATUTES of limitation of other states are of no effect in Massachusetts. *Putnam v. Dike*, 13 Gray 535. — *Bulger v. Roche*, 11 Pick. 36, 38.

When statutes of limitation are set up in defence, the burden of proof is on the plaintiff to prove the case not to be within their provisions. *Pond v. Gibson*, 5 Allen 19.

Statutes of limitation have full force and effect *in equity* as well as at law. They operate on equitable proceedings suo vigore, and not as a rule of comity, or as a measure of judicial discretion. *Dodge v. Essex Insurance Co.*, 12 Gray 65, 71. — *Upham v. Wyman*, 7 Allen 499, 502. — *Commonwealth v. Cochituate Bank*, 3 Allen 42, 47. — *Attorney-General v. Federal Street Meeting-house*, 3 Gray 1, 62. — *Merriam v. Hassam*, 14 Allen 516, 522. — *Baker v. Atlas Bank*, 9 Met. 182, 195. But see *Ayres v. Waite*, 10 Cush. 72, 75. — *Attorney-General*

*v. Old South Society*, 13 Allen 474, 496. In this latter case, it was held that the statute afforded no bar in a case of misapplication of income by trustees of a public charity.

Statutes of limitation do not run against the estate of an insolvent in the hands of his assignee, (*Parker v. Sanborn*, 7 Gray 191, 194), nor against the estate of a deceased person, who has been represented insolvent under Gen. St. c. 99. *Ostrom v. Curtis*, 1 Cush. 461.

## CHAPTER CLIV.

### OF THE LIMITATION OF REAL ACTIONS AND RIGHTS OF ENTRY.

For a sketch of the history of the different statutes of limitation of real actions in Massachusetts, see decision of Judge GRAY in *Edson v. Munsell*, 10 Allen 557.

SECT. 1. This section does not apply to a writ of dower. *Parker v. Obear*, 7 Met. 24. The time within which such writs may be brought is now limited by chap. 90, s. 6.

This provision is no bar to an action for the recovery of real estate, unless the tenant holds by a title or possession adverse to that of the demandant. It, therefore, can never bar an action for the foreclosure of a mortgage, unless the mortgagee had been disseised by the mortgagor or some person claiming under him. *Bacon v. McIntire*, 8 Met. 87, 90.

Where a trustee sells the trust estate to a purchaser for value, with warranty and without giving in the deed of conveyance any intimation of a subsisting trust, and the vendee enters and occupies the estate, doing no act which recognizes in any manner the existence of the trust; and there is no fraud or concealment, and the cestui que trust is under no disability, the statute will bar the claim of the latter even in equity, and although he has no knowledge of the trust until shortly before he brings his suit. *Merriam v. Hassam*, 14 Allen 516, 522.

SECT. 3. *First Clause.* "*When any person is disseised.*"

As to what constitutes a *disseisin* within the meaning of this section, see *Motte v. Alger*, 15 Gray 322, 324.

Where there have been successive disseisins by different persons, unless there has been privity of estate between such persons, the seisin of the true owner will revive upon the determination of the possession of each disseisor, and the time limited by the statute will begin to run *only from the last disseisin*. Thus, where a disseisin by a husband was followed, upon his decease, by one by his wife, it was held that there was no privity of estate between them, and the possession of neither alone having lasted for twenty years, though that of both united far exceeded that term, the action of the original owner was not barred by the statute. *Sawyer v. Kendall*, 10 Cush. 241, 244.

*Third Clause.* This clause seems to be in adoption of the decisions in *Wells v. Prince*, 9 Mass. 508, and *Wallingford v. Heard*, 15 Mass. 471. In this latter case it was held that, where a tenant for life had been disseised and such disseisin had continued for forty years and until his death, the statute did not begin to run against the reversioner until the death of the tenant for life.

*Fifth Clause.* This clause does not cover the case of a mortgagee bringing his action to foreclose. *Bacon v. McIntire*, 8 Met. 87, 90.

SECT. 5. Act making special provision for actions by persons in the military or naval service of the United States. St. 1862, c. 188, s. 1.

For a sketch of the earlier statutes upon the subject of this section, see *Edson v. Munsell*, 10 Allen 557, 565.

*"If at the time when," &c.* A disability commencing subsequently to such time will have no effect. *Allis v. Moore*, 2 Allen 306. *It seems*, however, that where the disability commences so soon after the accruing of the right of action as to afford to the party no reasonable opportunity to adopt the necessary measures for the protection of his rights, it will be deemed to have existed, in the sense of the statute, "at the



time when," &c. *Currier v. Gale*, 3 Allen 328, 330. See also chapter 155, section 6, and cases there cited.

SECT. 7. This section was enacted in adoption of the rule as previously laid down in *Dow v. Warren*, 6 Mass. 328.

SECT. 8. It seems to be doubtful whether this section was intended to apply to actions of tort in the nature of trespass quare clausum. See *Putney v. Dresser*, 2 Met. 583, 587.—*Tyler v. Smith*, 8 Met. 599, 604.

*It seems* that the entry and possession referred to in this section are a mere formal entry and momentary possession, and that the section is not applicable to a case where one takes actual, peaceable possession of premises, no one being in possession at the time. *Tyler v. Smith*, 8 Met. 599, 604.

SECT. 12. The provisions of this section "shall not apply to any property, right, title, or interest of the commonwealth below high-water mark or in the great ponds." St. 1867, c. 275.

This provision, which was first inserted in the Revised Statutes of 1836, altered the law previously existing in this state. See *Stoughton v. Baker*, 4 Mass. 522, 528.

Under this section the right of the commonwealth to seize a parcel of land, as having escheated by reason of the alienage of its owner, will be barred by the lapse of twenty years. *Piper v. Richardson*, 9 Met. 155, 157.

## CHAPTER CLV.

### OF THE LIMITATION OF PERSONAL ACTIONS.

The statute of limitations of another state is no good bar to an action brought here upon a contract made in that state, although all the parties resided in, and were citizens of, that state at the time the contract was made,—the principle being, that the laws of the country where the remedy

is sought, are to govern in regard to it. *Byrne v. Crowninshield*, 17 Mass. 55.

SECT. 1. "*After the cause of action accrues.*" There is no presumption of law, from the mere fact that more than six years have elapsed since the date of a promissory note, that the right of action thereon is barred by the statute of limitations. *Thomas v. Waterman*, 7 Met. 227, 229.

*First Clause.* This clause applies to debts created by statute provision, as, for instance, to the personal liability of stockholders in corporations. *Baker v. Atlas Bank*, 9 Met. 182, 195. — *Commonwealth v. Cochituate Bank*, 3 Allen 42, 46.

Where the maker and the holder of a note entered into an indenture by which they agreed that payment of such note should be postponed for a certain time, and that it should afterwards be paid upon certain conditions, it was held that a suit might be maintained against the maker of the note upon his covenants in such indenture, although more than six years had expired since the note became due according to its terms. *American Bank v. Baker*, 4 Met. 164.

"*Some court of record.*" A judgment of a justice of the peace is not a judgment of a court of record, within the meaning of this section. *Smith v. Morrison*, 22 Pick. 430. — *Mowry v. Chessman*, 6 Gray 515, 516. The police court of Lowell has been held to be a court of record. *Bannegan v. Murphy*, 13 Met. 251.

*Second Clause.* "*Except upon leases under seal.*" These words were inserted in adoption of the decision in *Buffum v. Deane*, 4 Gray 385, 393.

*Fourth Clause.* "*All actions of tort.*" Whether these include actions of waste, quære. See *Padelford v. Padelford*, 7 Pick. 152. — Gen. St. c. 129, s. 1. — Gen. St. c. 138, s. 4. — Gen. St. c. 90, s. 14.

SECT. 2. Actions against executors, administrators, guardians, trustees, sheriffs, deputy sheriffs, constables, and assign-

ees in insolvency, *for the taking or conversion of personal property*, must also be commenced within two years next after the cause of action accrued. St. 1861, c. 177.

SECT. 3. See St. 1861, c. 177 (referred to under preceding section), which limits to two years actions against sheriffs for the taking or conversion of personal property.

The "actions against sheriffs," affected by this section, do not include those which come within the terms of the preceding section. *Sibley v. Estabrook*, 4 Gray 295, 296.

The cause of action against a sheriff, for money officially received by his deputy, does not *accrue* until demand for such money is made by the person entitled thereto. *Weston v. Ames*, 10 Met. 244, 248. — *King v. Rice*, 12 Cush. 161, 163.

SECT. 4. "*Promissory note*." These words are not to be limited to *negotiable* notes, but were intended to apply to any note in writing by which one promises to pay money to another. *Sibley v. Phelps*, 6 Cush. 172. — *Commonwealth Insurance Co. v. Whitney*, 1 Met. 21, 22. Thus a memorandum written on a note by the maker in these words: "For value received I hereby acknowledge this note to be due, and promise to pay the same on demand," has been held to be a promissory note within the meaning of this section, and, if signed in the presence of an attesting witness, to be subject to its provisions. *Commonwealth Insurance Co. v. Whitney*, 1 Met. 21, 22. But where the words written on a note were: "I acknowledge the within note to be just and due," it was held that such writing, signed in the presence of an attesting witness, did not constitute an attested promissory note within this section. *Gray v. Bowden*, 23 Pick. 282.

"*Signed in the presence of an attesting witness*." It is not necessary that there should be any words of attestation over the signature of the witness. *Faulkner v. Jones*, 16 Mass. 290.

"In order to constitute an attestation of a note within the

statute, the witness must put his name to it openly, and under circumstances which reasonably indicate that his signature is with the knowledge of the promisor, and is a part of the same transaction with the making of the note," and the burden of proof is on the holder of the note to show that it was properly attested. *Drury v. Vannevar*, 1 Cush. 276, 277. — *Smith v. Dunham*, 8 Pick. 246.

"If the action is brought by the original payee or his executor or administrator." The fact that a note has been sold, and that the action is brought by the purchaser in the name of the original payee or of his executor or administrator, will not take the case out of the operation of this section. *Rockwood v. Brown*, 1 Gray 261. — *Sigourney v. Severy*, 4 Cush. 176. — *Hodges v. Holland*, 19 Pick. 43. — *Drury v. Vannevar*, 5 Cush. 442. But where the party named as payee in the note had not accepted or assented to it until after the death of the maker, it was held that the holder of the note could not maintain an action upon it, after the six years, in name of such payee. *Village Bank v. Arnold*, 4 Met. 587.

If the attesting witness becomes himself the owner of the note, his attestation cannot be proved, and the provisions of this section will therefore be of no effect in such case. *Jourdain v. Sherman*, 6 Cush. 139.

This section has been held to apply to an action brought by the original payee of a note *in the name of his assignee in insolvency*, to whom the note had passed by an assignment in insolvency, and by whom it had been reassigned to the original payee. *Pitts v. Holmes*, 10 Cush. 92. In the above case the action might also have been brought in the name of the original payee. *Drury v. Vannevar*, 5 Cush. 442.

This section is not applicable to an action brought by the indorsee of a note made payable to the maker's own order and indorsed by him *in blank*, though the note was both signed and indorsed in the presence of an attesting witness. It seems, however, that the rule might be different if the indorsement

were not in blank. *Houghton v. Mann*, 13 Met. 128. — *Kinsman v. Wright*, 4 Met. 219.

SECT. 5. “*To recover the balance due upon a mutual and open account current.*” This applies, not only to actions which are in form brought for the balance of an account, that is, where both debits and credits are stated and a balance struck, but also to actions where the purpose of the plaintiff, although he declares only on the debit side of his own account, is to obtain a balance only, leaving it to the other party to file an account in offset, or prove the items of his side of the account in payment, if he can do so. *Penniman v. Rotch*, 3 Met. 216, 219. — *Dickinson v. Williams*, 11 Cush. 258, 261.

It seems that where an account is balanced, it will thereupon cease to be an open account current, even though the balance is not paid in cash, but is carried forward to a new account. Thus, where the bank-book of a depositor in a bank was balanced every month, and the balance made the first item in a new account, the checks drawn by the depositor during the month being restored to him, it was held that, as to any such balance, the statute of limitations began to run from the time when such balance was struck. *Union Bank v. Knapp*, 3 Pick. 96, 110.

All items entered in a general account in the books of the parties are not necessarily items in a mutual and open account between them. *Stickney v. Eaton*, 4 Allen 108.

“*At the time of the last item.*” Such item may be on either side of the account. *Penniman v. Rotch*, 3 Met. 216, 220.

\*Where there has been an open account, and the debtor gives his creditor collateral security for payment of the balance due him, collections made upon such collateral will be regarded as payments by the debtor and items in the account. *Whipple v. Blackington*, 97 Mass. 476, 478.

SECT. 6. Act making special provision for actions by persons in the military or naval service of the United States. St. 1862, c. 188, s. 1. See notes to section 5 of chapter 154.

*"Absent from the United States."* These words include foreigners who never were in the United States. *Von Hemert v. Porter*, 11 Met. 210, 215. — *Hall v. Little*, 14 Pick. 203. But see note to next section. The fact that a person has an agent here will not exclude him from the benefit of this provision. *Wilson v. Appleton*, 17 Mass. 179.

SECT. 7. Where the creditor of a deceased insolvent has proved his claim against the estate of the deceased under Gen. St. c. 99, his claim against such estate for a dividend will not be barred, under this section, by the lapse of twenty years. *Bancroft v. Andrews*, 6 Cush. 493, 495.

Under this section an action brought by a foreigner against a citizen of this state, upon a contract made abroad and to be performed there, will be barred in twenty years, although the foreigner never comes into the state during that time, this being a case "not contemplated and embraced or affected by the other provisions of the statute, nor limited by the provisions of the sixth section." *Von Hemert v. Porter*, 11 Met. 210, 216.

An action on a probate bond may be brought at any time within twenty years after the breach of condition relied on as the ground of action. *Prescott v. Read*, 8 Cush. 365.

SECT. 9. The second clause of this section applies only to the actions mentioned in this chapter, and consequently does not apply to a writ of scire facias against bail. *Gass v. Bean*, 5 Gray 397, 398.

It applies to cases coming within the first clause as well as to others. *Milton v. Babson*, 6 Allen 322.

*"Is absent from and resides out of."* Occasional and temporary absences, which do not amount to a change of domicile, are not within the meaning of this section. *Langdon v. Doud*, 6 Allen 423. — s. c. 10 Allen 433. — *Colleston v. Hailey*, 6 Gray 517. See also *White v. Bailey*, 5 Mass. 271. — *Byrne v. Crowninshield*, 1 Pick. 263. But if a debtor is absent from and resides out of the state, retaining no dwelling-house

or boarding-place here, though intending to return at some future indefinite time, he has no domicile here, and the time of his absence is to be deducted. *Sleeper v. Paige*, 15 Gray 349.

The fact that a debtor has been brought into the state under a warrant for crime, and imprisoned here therefor, will not make his residence here any less effectual under the statutes of limitation, than if he had come into the state of his own free will. *Turner v. Shearer*, 6 Gray 427.

SECT. 10. If a person *entitled to bring an action* dies within the time of limitation, and the party liable to such action has *also* deceased, and his executor or administrator has given bond as provided in chapter 97, the executor or administrator of the creditor will not, by reason of this section, be entitled to bring an action against the executor or administrator of the debtor after the expiration of the time limited by section 5 of chapter 97. *Hill v. Mixter*, 5 Allen 27.

*"The executor or administrator of the deceased person."* An action brought by one who was appointed, in this state, administrator of the estate of an inhabitant of another state, was held to be within the provisions of this section. *Gallup v. Gallup*, 11 Met. 445.

SECT. 11. *"Duly commenced."* An action commenced by writ returnable according to law, and containing a declaration adapted to the cause of action, is duly commenced within the meaning of this section, although such action may have been abated by reason of having been brought in the wrong county. *Woods v. Houghton*, 1 Gray 580.

*"By any unavoidable accident."* A. sued out a writ against B., and described him as living in a certain town, in which B. had formerly lived, but from which he had, without A.'s knowledge, removed to another town in another county about two years before. The writ was delivered to an officer a short time before the expiration of the time allowed by the statute, and he made return that he could not find B. in his

precinct. Subsequently, and after the time had run out, A. sued out another writ against B., and it was held that the first action was duly commenced, that it failed of a sufficient service by an unavoidable accident, and that the second action might be maintained. *Bullock v. Dean*, 12 Met. 15.

“*For any matter of form.*” An abatement or dismissal, for want of jurisdiction, of a trustee process brought in a county in which neither of the trustees resided, was held to be an abatement or dismissal for matter of form. *Woods v. Houghton*, 1 Gray 580.

The dismissal of an action because of an accidental omission of the clerk to enter it seasonably on the docket, was also held to be a dismissal for matter of form. *Allen v. Sawtelle*, 7 Gray 165.

But where a plaintiff failed to file, in accordance with an order of court, a sufficient statement of his reasons for avoiding a discharge in insolvency on which the defendant relied in defence, and went to trial on his insufficient statement, and not being allowed to prove any facts except those which he had specifically alleged, became nonsuit by leave of court, it was held that his action had not been defeated by any “matter of form.” *Swan v. Littlefield*, 6 Cush. 417.

SECT. 12. For the law prior to the passage of this provision, see *Welles v. Fish*, 3 Pick. 74. — *Homer v. Fish*, 1 Pick. 435. — *First Massachusetts Turnpike v. Field*, 3 Mass. 201. The principle of this section has been held applicable to suits in equity. *Farnam v. Brooks*, 9 Pick. 244.

“*Fraudulently conceals.*” It is necessary to prove a concealment and a discovery of the fraud within six years. It seems that the fraud must be actual, and not merely constructive, and that there is no concealment, if the party possesses full means of acquiring knowledge of the facts, even though he may have been misled by the fraudulent misrepresentations of the defendant. See *Nudd v. Hamblin*, 8 Allen 180.



“*The cause of such action.*” Where an insolvent debtor concealed property from his assignee, and concealed from a creditor fraudulent acts, which, if known, would have enabled such creditor to avoid the debtor’s discharge, it was held that such concealment did not bring within the operation of this section an action brought by the creditor to recover an amount due him, inasmuch as there was no fraudulent concealment of the *cause* of such action. *Rice v. Burt*, 4 Cush. 208.

SECT. 14. This section is not applicable to the case of partners, even after a dissolution of the partnership, provided the act is done prior to notice of such dissolution. *Sage v. Ensign*, 2 Allen 245.

SECT. 17. When a debtor, who owes several distinct debts to the same creditor, makes such creditor a payment without any special application thereof to any particular debt, the creditor cannot apply the payment to a debt *already barred* by the statute, so as to take such debt out of its operation, — he may, however, apply it to a debt *not then barred*, with the same effect as if the payment had been expressly made by the debtor on account of that debt. *Ramsay v. Wyman*, 97 Mass. 8, 13.

“*But no indorsement \* \* \* shall be deemed sufficient proof.*” Such indorsement will not even furnish any competent evidence of payment, except so far as it may be proved to have been made with the knowledge of the maker of the note. *Davidson v. Delano*, 11 Allen 523. — *Waterman v. Burbank*, 8 Met. 352, 354.

## TITLE VI.

## OF COSTS AND THE FEES OF CERTAIN OFFICERS.

## CHAPTER CLVI.

## OF COSTS IN CIVIL ACTIONS.

Costs are regulated by the statutes in force at the time when judgment is rendered. *Brigham v. Drake*, 2 Allen 49, 51.

Joint defendants, who do not sever in their defence, are entitled to but one bill of costs. *Mathers v. Cobb*, 3 Allen 467.

SECT. 1. "*In all civil actions.*" These do not include submissions to arbitration under chapter 147. *Bond v. Fay*, 1 Allen 212. — *Loud v. Hobart*, 2 Cush. 325, 326.

"*The prevailing party.*" When a case is dismissed for want of jurisdiction, the defendant, as the prevailing party, will be entitled to costs. *Elder v. Dwight Manufacturing Co.*, 4 Gray 201.

"*Shall recover his costs.*" This will not prevent the court from carrying into effect, in certain cases, an agreement of a party to an action that he will not claim costs, or a particular item of costs, or costs of certain terms of court. *Coburn v. Whitely*, 8 Met. 272, 274, 277. — *Moon v. Cutter*, 3 Allen 468, 470.

SECT. 5. Full costs to be recovered, without regard to the amount of damages, in actions relating to easements, and in which the title to real estate may be concerned, provided, &c. St. 1862, c. 36.

"*In personal actions.*" These include actions of tort in the nature of trespass quare clausum. *Heims v. Ropes*, 11 Allen 352.

But they do not include complaints, under Gen. St. c. 70, s. 5, to compel the kindred of a poor person to contribute

towards his support. *South Reading v. Hutchinson*, 10 Allen 68.

*"A sum not exceeding twenty dollars for debt or damages."*

A plaintiff will be entitled to full costs, who recovers a sum exceeding \$20 in the aggregate on different counts in his declaration, although he recovers no more than \$20 on any one count. *Hillman v. Whitney*, 2 Allen 268.

Unless the amount of the verdict, without adding interest to the time of judgment, amounts to \$20, the plaintiff will not be entitled to his costs. *"Joannes" v. Pangborn*, 6 Allen 243.

SECT. 6. *"Or overbalanced."* Contrary to what might, at first sight, appear to be the meaning of this section, a plaintiff will not be entitled to costs, if his claim be overbalanced by set-offs, and a verdict is rendered for the defendant. *Wolcott v. Doolley*, 4 Allen 400.

Where there was a general verdict for a defendant in an action in which he had filed a set-off, it was held that neither party was entitled to costs. *Caverly v. Bushee*, 1 Allen 292.

SECT. 16. *"In other civil suits and proceedings."* A submission to arbitration is such a proceeding. *Bond v. Fay*, 1 Allen 212.

*"In the discretion of the court."* To the exercise of such discretion no exception will lie. *Bond v. Fay*, 1 Allen 212.

SECT. 19. This section repealed and superseded by St. 1862, c. 144.

SECT. 21. As to the extent of the power of arbitrators regarding costs, see *Jones v. Carter*, 8 Allen 431.

SECT. 27. Act in relation to costs in cases of appeals and exceptions from the superior court. St. 1861, c. 163.

Sum not exceeding \$10 may be allowed for printing briefs in cases on the law docket of the supreme court. St. 1865, c. 33.

## CHAPTER CLVII.

## OF THE FEES OF CERTAIN OFFICERS.

Act prescribing and limiting the fees of commissioners to take depositions and acknowledgments in other states. St. 1862, c. 76.

Act fixing fees of trial justices and of justices of police courts in criminal prosecutions. St. 1860, c. 191, s. 1, clauses i and iv.

Fees of collectors of taxes. St. 1862, c. 183, s. 10.

*Justices of the Peace.*

SECT. 2. "The fee for taking an acknowledgment of a deed, and also the fee for administering an oath required by law, except in a trial or examination before the magistrate himself, whether to one or more persons at the same time, shall be twenty-five cents." St. 1866, c. 193, s. 2.

*Clerks of the Courts.*

SECT. 3. As to the fees of clerks of courts in criminal prosecutions, see St. 1860, c. 191, s. 1, clauses ii and iv.

*Sheriffs.*

Fees to be allowed to any officer for the use of a horse and carriage in service of civil process, provided, &c. St. 1864, c. 274.

As to the fees of sheriffs and other officers in criminal cases, and upon precepts for the commitment of lunatics, see St. 1862, c. 216. — (St. 1860, c. 191, ss. 1–5.)

Fees of sheriffs for service of summons or scire facias, — for service of capias, or of an attachment with summons, — for copies of precepts, — for taking bail, &c., — for serving executions, &c., — and for travel, altered by St. 1865, c. 101.

Acts relating to the payment of officers for attendance upon courts or meetings of county commissioners. St. 1862, c. 102. — St. 1866, c. 190.

*Jailers.*

SECT. 5. This section repealed by St. 1864, c. 270, s. 2.

*Constables.*

SECT. 7. As to the fees of constables in criminal cases and upon precepts for commitment of lunatics, see St. 1862, c. 216. — (St. 1860, c. 191, ss. 1–5.)

*Jurors, Witnesses, Appraisers, Commissioners, &c.*

SECT. 8. Fees of grand and traverse jurors in supreme and superior courts to be \$3.50 a day for attendance, and eight cents a mile travel out and home. St. 1869, c. 73. (Fee for attendance previously altered to \$2.50 by St. 1866, c. 121.)

As to the fees of witnesses in *criminal* prosecutions, see St. 1860, c. 191, ss. 1, 6.

Fees of witnesses in *probate courts* to be \$1.25 a day. St. 1868, c. 87.

Witnesses before *city and town officers* to be entitled to same fees as witnesses before police courts. St. 1863, c. 158, s. 1.

In criminal cases, witnesses entitled to five cents a mile travel. St. 1860, c. 191, s. 1.

Witnesses before *executive council*, or any committee thereof, entitled to same fees as witnesses before legislature. St. 1861, c. 166.

As to the mode of paying fees of witnesses before the legislature, see St. 1860, c. 41.

*Secretary of the Commonwealth.*

SECT. 11. This section repealed and superseded by St. 1863, c. 231, ss. 1, 5. See also St. 1865, c. 259, s. 1.

As to the fees of the secretary for filing certificates of organization of corporations, or other papers, see St. 1863, c. 231, s. 2. — St. 1865, c. 76.

As to his fees for examinations of records or papers. St. 1863, c. 231, s. 3.

*Special Provisions.*

All officers, whose duty it is to furnish copies of records or other papers, to be entitled to same rate per page as registers of deeds, — except where required to furnish copies without charge, and except also in criminal cases. St. 1865, c. 259, s. 1.

SECT. 14. Under the rule prescribed in this section, it has been held that a collector, upon selling land for non-payment of taxes, might add to the amount for which he sold the land a percentage or poundage in the same manner as sheriffs under Gen. St. c. 122, s. 5. *Howard v. Proctor*, 7 Gray 128, 132. But, where the collector received payment of the tax after advertising, and before sale at auction, it has been held that he was not entitled to the same fees as a sheriff who had satisfied an execution upon real estate. *Converse v. Jennings*, 13 Gray 77, 78. (The fees of collectors of taxes are now regulated by St. 1862, c. 183, s. 10.)



## PART IV.

---

### OF CRIMES, PUNISHMENTS, PROCEEDINGS IN CRIMINAL CASES, AND PRISONS.

---

#### TITLE I.

##### OF CRIMES AND PUNISHMENTS.

---

#### CHAPTER CLVIII.

##### OF THE RIGHTS OF PERSONS ACCUSED.

#### CHAPTER CLIX.

##### OF OFFENCES AGAINST THE SOVEREIGNTY OF THE COMMONWEALTH.

#### CHAPTER CLX.

##### OF OFFENCES AGAINST THE PERSON.

SECT. 8. Notwithstanding this provision, the supreme court may, without the intervention of a jury, award sentence of death against a prisoner who, to an indictment for murder in the usual form, has pleaded guilty of murder in the first degree. Opinion of Justices, 9 Allen 585. — *Green v. Commonwealth*, 12 Allen 155, 166.

SECT. 6. This provision is not inconsistent with the twelfth article of the Declaration of Rights. *Green v. Commonwealth*, 12 Allen 155, 170. — *Commonwealth v. Gardner*, 11 Gray 438. — *Commonwealth v. Desmarteau*, 16 Gray — .



SECT. 22. As to the form of an indictment under this section, see *Commonwealth v. Mowry*, 11 Allen 20.

SECT. 25. Snatching a bank-bill from the owner's hand, and thereby touching his hand, but with no intention of injuring or touching his person, is not within this section. *Commonwealth v. Ordway*, 12 Cush. 270.

As to the proper form of indictment under this section, see *Commonwealth v. Sanborn*, 14 Gray 393.

SECT. 26. As to the form of an indictment under this section, see *Commonwealth v. Fogerty*, 8 Gray 489.

SECT. 28. A false statement that a warrant has been issued to arrest a person for crime, and that such warrant will be served unless money is paid to stay the process, is a threat to accuse of crime within the meaning of this section. *Commonwealth v. Murphy*, 12 Allen 449.

As to the form of an indictment under this section, see *Commonwealth v. Murphy*, 12 Allen 449.

SECT. 30. See *Commonwealth v. Nickerson*, 5 Allen 518.

SECT. 32. An indictment under this section need not contain an averment that the mixture was poisonous, or that the defendant knew it to be so. *Commonwealth v. Galavan*, 9 Allen 271.

SECT. 34. Similar provision regarding the loss of life of passengers and others by reason of the negligence, &c., of street railway corporations. St. 1864, c. 229, s. 37.

A penalty cannot be recovered under this section, to be paid over to the executor or administrator of the deceased, unless such executor or administrator has been appointed in this state. *Commonwealth v. Sanford*, 12 Gray 174.

An indictment under this section may be brought at any time within six years. *Commonwealth v. East Boston Ferry Co.*, 13 Allen 589.

As to the proper form of an indictment under this section, see *Commonwealth v. East Boston Ferry Co.*, 13 Allen 589.

## CHAPTER CLXI.

### OF OFFENCES AGAINST PROPERTY.

SECT. 2. "*Erected for public use.*" See *Commonwealth v. Norrigan*, 2 Allen 159.

SECT. 4. As to the form of indictment under this section, see *Commonwealth v. Hamilton*, 15 Gray 480.

SECT. 14. Penalty for offences under this section increased by St. 1869, c. 386.

SECT. 17. To constitute the offence of larceny "by stealing from the person," under this section, it is not necessary that the taking should be done either openly and violently, or privily and fraudulently, but if it be with the knowledge, though without the dissent or resistance of the owner, the offence is equally committed, provided the taking be with an intention, on the part of the offender, to deprive the owner of his property. *Commonwealth v. Dimond*, 3 Cush. 235.

SECT. 18. See *Commonwealth v. Stebbins*, 8 Gray 492. — *Commonwealth v. McKenney*, 9 Gray 114.

SECT. 31. "*The stolen property shall be restored.*" It must be the identical property stolen, and not its proceeds. *Commonwealth v. Boudrie*, 4 Gray 418.

SECT. 34. See *Commonwealth v. Tivnon*, 8 Gray 375.

SECT. 35. As to the distinction between embezzlement and larceny, see *Commonwealth v. O'Malley*, 97 Mass. 584.

Fraudulent conversion to his own use, of money paid to one by mistake, is not within this section. *Commonwealth v. Hays*, 14 Gray 62.

A mortgage deed may be the subject of embezzlement under this section. *Commonwealth v. Concannon*, 5 Allen 502, 506.

SECT. 38. "*An officer, agent, clerk, or servant.*" A treasurer of a railroad corporation is such. *Commonwealth v. Tuckerman*, 10 Gray 173, 187.

A mechanic receiving materials to be made into shoes at his own shop, is not the agent or servant of the person furnishing the leather, within the meaning of this section. *Commonwealth v. Young*, 9 Gray 5.

As to what constitutes *embezzlement* within the meaning of this section, see *Commonwealth v. Tuckerman*, 10 Gray 173, 201.

SECT. 39. "*Of an incorporated bank.*" This includes banks incorporated subsequently to the passing of the statute, and also those created under the laws of the United States. *Commonwealth v. Tenney*, 97 Mass. 50, 56.

"*Fraudulently converts.*" See *Commonwealth v. Tenney*, 97 Mass. 50, 56.

"*Fraudulently takes and secretes with intent to do so.*" See *Commonwealth v. Shepard*, 1 Allen 575.

SECT. 53. See *Commonwealth v. Collins*, 12 Allen 181.

SECT. 54. As to the county in which offences under this section may be punished, see St. 1863, c. 248, s. 1.

Punishment for obtaining goods under false pretences of *carrying on business*. St. 1863, c. 248, s. 2.

For knowingly buying, receiving, &c., goods obtained under false pretences. St. 1863, c. 248, s. 3.

One who obtains money upon a mortgage of personal property, which he falsely represents that he owns, may be convicted under this section. *Commonwealth v. Lincoln*, 11 Allen 233.

One who obtains money of another by falsely representing to him that on a previous occasion he had omitted to return the proper change to the person making the representation, and thereby inducing him to correct the supposed mistake, is not within this section. *Commonwealth v. Norton*, 11 Allen 266.

As to the form of indictment, &c., under this section, see *Commonwealth v. Lincoln*, 11 Allen 233. — *Commonwealth v. Nason*, 9 Gray 125. — *Commonwealth v. Jeffries*, 7 Allen 548. — s. c. 12 Allen 145. — *Commonwealth v. Lannan*, 1 Allen 590.

SECT. 59. As to the form of indictment under this section, see *Commonwealth v. Brown*, 15 Gray 189.

SECT. 62. One to whom property is sold by a mortgagor, contrary to the provisions of this section, may treat such sale as void. *Bryant v. Pollard*, 10 Allen 81, 82.

But if the sale be made with the oral consent of the mortgagee, the title, as against him, will pass to the vendee. *Staford v. Whitcomb*, 8 Allen 518.

SECT. 63. Fraudulent buying, receiving, &c., of personal property hired or leased, punished. St. 1865, c. 127, s. 1.

SECT. 64. Fraudulent buying, receiving, &c., of personal property held as collateral security, punished. St. 1865, c. 127, s. 1.

Proof that a negotiable note has been transferred in violation of this section will not defeat an action upon it, brought by a bonâ fide holder who took it before maturity and for a valuable consideration. *Gardner v. Gager*, 1 Allen 502, 504.

SECT. 80. As to the form of indictment under this section, see *Commonwealth v. Brooks*, 9 Gray 299. — *Commonwealth v. Sowle*, 9 Gray 304.

SECTS. 81-84. Punishment for offences under these sections altered by St. 1868, c. 321.

SECT. 82. "*Breaks any glass in a building.*" An indictment under this section must aver the glass to be a *part* of a building. An allegation in the terms of this section will not be sufficient. *Commonwealth v. Bailey*, 11 Cush. 414.

SECT. 84. Wilful trespass by passing over gardens, &c., between April 1st and Nov. 1st, after being forbidden, how punished. St. 1862, c. 89.

SECT. 85. As to the form of indictment under this section, see *Commonwealth v. Cox*, 7 Allen 577.

#### *Additional Provisions.*

Mooring vessels to, or injuring, &c., beacons, buoys, &c., placed by the United States, how punished. St. 1860, c. 53.

Wilful or malicious injury to buildings, how punished. St. 1862, c. 160.

Wilful and malicious injury to books in public libraries, how punished. St. 1869, c. 69.

Wilful or reckless injury to baggage, &c., how punished. St. 1869, c. 307.

## CHAPTER CLXII.

### OF FORGERY AND OFFENCES AGAINST THE CURRENCY.

The common law relative to forgery is not superseded, but any forgery, which is not here enumerated, is still indictable at common law. *Commonwealth v. Ayer*, 3 Cush. 150.

SECT. 1. A bank-bill is not a "promissory note" within the meaning of this and the following sections. *Commonwealth v. Dole*, 2 Allen 165. The earlier rule on this subject had been different. See *Commonwealth v. Paulus*, 11 Gray 305. — *Commonwealth v. Woods*, 10 Gray 477, 481. — *Commonwealth v. Thomas*, 10 Gray 483.

A receipt in full of all demands is a "discharge for money," within the meaning of this section. *Commonwealth v. Talbot*, 2 Allen 161.

*"Promissory note for the payment of money."* It is not necessary that the words "for the payment of money" should be inserted in an indictment under this or the following sections. *Commonwealth v. Castles*, 9 Gray 123.

SECT. 4. This applies to bills issued by national banks established in other states. *Commonwealth v. Hall*, 97 Mass. 570.

As to the fulness with which the words on a bank-bill must be copied in an indictment under this section, see *Commonwealth v. Wilson*, 2 Gray 70.

SECT. 6. As to the form of indictment under this section, see *Commonwealth v. Hall*, 4 Allen 305. — *Commonwealth v. Simonds*, 11 Gray 306.

SECT. 8. Possession of a counterfeit bill of a bank of this state, with intent to pass it in another state, is within this section. *Commonwealth v. Price*, 10 Gray 472.

SECT. 25. As to the form of indictment under this section, see *Commonwealth v. Clancy*, 7 Allen 537.

SECT. 26. Provisions of this section extended to treasury notes, certificates, bills of credit, and other securities issued by or on behalf of the United States. St. 1862, c. 63.

## CHAPTER CLXIII.

### OF OFFENCES AGAINST PUBLIC JUSTICE.

Officers, agents, &c., of state, town, &c., receiving commission, bonus, discount, &c., on contract, purchase, &c., liable to penalty, — also party giving such commission, &c. St. 1862, c. 101..

SECT. 1. As to the form of indictment for perjury, see St. 1860, c. 186, s. 1.

*"In any proceeding in a court of justice."* See *Jones v. Daniels*, 15 Gray 438, 439.

SECT. 2. It seems that this section has reference to *official* oaths, such as those required of directors of banks and other corporations, or of individuals of whom, by special statute provisions, oaths are required. *Jones v. Daniels*, 15 Gray 438, 439. But see *Commonwealth v. Hughes*, 5 Allen 499, 500.

SECT. 3. As to the form of indictment for subornation of perjury, see St. 1860, c. 186, s. 2.

Under this section, one may be convicted of subornation of perjury, who procures the commission of the perjury here, through the agency of another guilty party without the limits of the state. *Commonwealth v. Smith*, 11 Allen 243.

SECT. 18. Similar penalty for falsely assuming to be the constable of the commonwealth, or his deputy. St. 1866, c. 261, s. 5.

Penalty for acting as justice of the peace or notary public after expiration of commission. St. 1865, c. 231, s. 2.

SECT. 20. "*Upon an agreement or understanding express or implied.*" See *Clark v. Pomeroy*, 4 Allen 584, 586. — s. c. 11 Allen 557.

## CHAPTER CLXIV.

### OF OFFENCES AGAINST THE PUBLIC PEACE.

SECT. 6. See *Commonwealth v. Campbell*, 7 Allen 541, 546.

SECT. 10. A complaint under this section must show that the arrest by the sheriff, &c., was lawful. *Commonwealth v. O'Connor*, 7 Allen 583.

## CHAPTER CLXV.

### OF OFFENCES AGAINST CHASTITY, MORALITY, AND DECENCY.

Penalty for sending to publishers of newspapers fraudulent notices of births, marriages, and deaths. St. 1860, c. 195.

SECT. 3. The rule set forth in section 5, as to the presumption that a husband or wife, who has been absent and not heard from for seven years, is dead, applies to cases under this section as well as to those under the next, to which alone the fifth section is in terms applicable. *Commonwealth v. Thompson*, 6 Allen 591. — s. c. 11 Allen 23.

SECT. 5. "*Had been continually remaining beyond sea.*" The provision regarding absence for seven years applies to this clause as well as to the succeeding one. *Commonwealth v. Johnson*, 10 Allen 196, 198.

"*Voluntarily withdrawn from the other.*" A party will be guilty of polygamy, however, who marries a woman whose husband is still alive, if she herself left him, although such leaving was for good cause, and she has remained absent for

seven years without hearing of him. *Commonwealth v. Thompson*, 11 Allen 23.

SECT. 7. A marriage contracted out of the state, and valid where contracted, will not be within this section, if not incestuous by the law of nature. *Sutton v. Warren*, 10 Met. 451.

SECT. 9. For cases arising under this section, see *Commonwealth v. Jackson*, 15 Gray 187. — *Commonwealth v. Wood*, 11 Gray 85. — *Commonwealth v. Sholes*, 13 Allen 554, 558. — *Commonwealth v. Brown*, 14 Gray 419.

SECT. 13. It is sufficient to support an indictment under this section, that the defendant has aided and assisted others in keeping a house of ill-fame. *Commonwealth v. Gannett*, 1 Allen 7.

“*Resorted to.*” See *Commonwealth v. Lambert*, 12 Allen 177.

“*Lewdness.*” This includes private illicit intercourse, as well as public indecency. *Commonwealth v. Lambert*, 12 Allen 177.

SECTS. 15–17. These sections modified by St. 1862, c. 168, ss. 1–3.

SECT. 22. This section repealed and superseded by St. 1867, c. 59.

SECT. 23. “*Assembly of people.*” See *Commonwealth v. Porter*, 1 Gray 476.

SECTS. 25–27. These sections were repealed and superseded by St. 1860, c. 166, — but that act was itself repealed, and these sections revived by St. 1861, c. 136, s. 1. St. 1861, c. 136, s. 1, having been repealed by St. 1869, c. 415, s. 65, the St. 1869, c. 452, was passed, repealing a second time St. 1860, c. 166, and declaring Gen. St. c. 165, ss. 25–27, to be in full force.

SECT. 25. For a case arising under this section, see *Commonwealth v. Miller*, 8 Gray 484.

SECTS. 27, 28. Persons convicted in Boston of drunkenness, or as common drunkards, and sentenced to imprisonment, shall have their sentences executed in the house of industry in said city. St. 1864, c. 258.



SECT. 28. Provision for committal of persons convicted under this section to the state workhouse. St. 1869, c. 258.

Vagrants, vagabonds, pickpockets, thieves, &c., to be arrested, &c. St. 1866, c. 235.

"*Common drunkards.*" See *Commonwealth v. Conley*, 1 Allen 6.

"*Lewd, wanton, and lascivious persons in speech or behavior.*" See *Commonwealth v. Parker*, 4 Allen 313.

"*Persons who neglect all lawful business,*" &c., &c. See *Commonwealth v. Sullivan*, 5 Allen 511.

SECT. 32. Provisions of this section made applicable to cases under St. 1866, c. 235. St. 1866, c. 235, s. 5.

SECT. 35. Provision for committal of persons convicted under this section to the state workhouse. St. 1869, c. 258.

SECT. 41. This section repealed and superseded by "An act for the more effectual prevention of cruelty to animals." St. 1868, c. 212. That statute was itself repealed and superseded by St. 1869, c. 344.

## CHAPTER CLXVI.

### OF OFFENCES AGAINST THE PUBLIC HEALTH.

SECT. 1. As to the form of indictment under this section, see *Commonwealth v. Boynton*, 12 Cush. 499.

SECT. 2. This section repealed and superseded by St. 1866, c. 253, ss. 1, 3.

## CHAPTER CLXVII.

### OF OFFENCES AGAINST PUBLIC POLICY.

SECT. 1. As to what is a *lottery*, see *Commonwealth v. Thurber*, 97 Mass. 583.

Provision concerning the setting up of lotteries *without* the commonwealth. St. 1869, c. 112, s. 1.

For a case under this section, see *Commonwealth v. Harris*, 13 Allen 534.

SECT. 3. As to selling, &c., tickets in lotteries without the commonwealth, see St. 1869, c. 112, s. 2.

See *Commonwealth v. Harris*, 13 Allen 534.

SECT. 6. See *Commonwealth v. Harris*, 13 Allen 534.

SECT. 7. See *Commonwealth v. Harris*, 13 Allen 534.

SECT. 9. This section "shall not be so construed as to make unlawful, trials of the speed of horses for premiums offered by legally constituted agricultural societies." St. 1865, c. 67.

SECT. 10. This section amended by striking out the words, "for the admission to which of persons or property any money or other valuable consideration shall be directly or indirectly taken or required." St. 1864, c. 63.

## CHAPTER CLXVIII.

SECT. 1. As to the cause of this provision, see *Commonwealth v. Carey*, 12 Cush. 246.

This section gives a new and technical definition of felony, differing from that of the common law. *Commonwealth v. Smith*, 11 Allen 243, 257.

SECT. 3. See *Commonwealth v. Smith*, 11 Allen 243, 259.

SECT. 4. See *Commonwealth v. Smith*, 11 Allen 243, 258.

SECT. 5. See *Commonwealth v. Smith*, 11 Allen 243, 259.

---

## TITLE II.

### OF PROCEEDINGS IN CRIMINAL CASES.

"AN act to provide for inquests in cases of fire." St. 1867, c. 303.

## CHAPTER CLXIX.

## OF PROCEEDINGS TO PREVENT THE COMMISSION OF CRIME.

SECT. 1. "*For their good behavior.*" See Knowles v. Davis, 2 Allen 61.

## CHAPTER CLXX.

## OF SEARCH WARRANTS, REWARDS, ARREST, EXAMINATION, COMMITMENT, AND BAIL.

*Search Warrants.*

SECT. 1. Similar provision for search warrant for personal property hired, leased, or held as collateral security, and fraudulently concealed. St. 1865, c. 127, s. 2.

See Dwinnels v. Boynton, 3 Allen 310.

SECT. 2. *Second Clause.* The terms of this clause extended by St. 1862, c. 168, ss. 4, 5.

*Fourth Clause.* The terms of this clause extended by St. 1869, c. 364, ss. 2, 3.

Search warrant for meat of calf killed when less than four weeks old, authorized. St. 1866, c. 253, s. 2.

*Rewards for Apprehending Offenders.*

SECT. 7. Under this section it has been held that the person for whose arrest a reward is offered must have been charged with a crime *by a complaint or indictment.* Day v. Otis, 8 Allen 477. By St. 1866, c. 9, however, it was provided that a reward might be offered "to any person who, in consequence of such offer, detects and secures any person *who has committed a capital or other high crime or misdemeanor.*"

*Arrest, Examination, Commitment, Bail.*

SECT. 10. "When a complaint duly charging an offence is presented in writing to a magistrate, and he administers the

oath to the complainant, and certifies it in the usual form, this is conclusive evidence of a compliance with the provisions of" this section. *Commonwealth v. Farrell*, 8 Gray 463.

"*Subscribed by the complainant.*" A complaint signed below the description of the goods stolen, but above the charge of larceny, is not properly subscribed. *Commonwealth v. Barhight*, 9 Gray 113.

"*Reciting the substance of the accusation.*" It will be a sufficient compliance with this provision, if the warrant be made on the same paper with the complaint, and definitely refers to it. *Commonwealth v. Dean*, 9 Gray 283.

SECT. 12. In Suffolk, justices of the peace, and justices of the peace and of the quorum, have no authority to take bail in criminal cases. St. 1862, c. 159, s. 4.

SECT. 20. "*Examine the complainant.*" It is not necessary in all cases that the complainant should himself be examined. *Commonwealth v. Dillane*, 11 Gray 67, 71.

SECT. 26. "Any justice of any court of record may at any time, during a term of such court or in vacation, order a witness for the commonwealth in any criminal case pending in such court, to recognize," &c., &c. St. 1868, c. 69.

SECTS. 33, 34. These sections "apply only to cases where the magistrate *commits a party to prison or takes his recognizance* for his appearance before a higher court." *Stevens v. Hathorne*, 12 Allen 402, 403.

SECT. 36. As to bail in Suffolk county, see St. 1862, c. 159.

SECT. 39. As to the form of the condition of a recognizance under this section, see *Commonwealth v. Nye*, 7 Gray 316.

SECTS. 41, 42. Repealed by St. 1862, c. 169, s. 3. Bail may be exonerated by surrendering principal before default on recognizance. Upon surrender after default, penalty may be remitted in whole or in part. St. 1863, c. 59.

SECT. 44. Repealed. St. 1862, c. 169, s. 3.

*Additional Provision as to Bail.*

Persons who forfeit bail, &c., in criminal cases, not to be further bailed, except, &c. St. 1862, c. 169, s. 1.

## CHAPTER CLXXI.

## OF INDICTMENTS, PROSECUTIONS, AND PROCEEDINGS BEFORE TRIAL.

It is not necessary that the judge of the court should be present in the town, or even in the county where the court is held, during all the time that the grand jury is deliberating. *Commonwealth v. Bannon*, 97 Mass. 214.

SECT. 1. This section "shall not apply to the county of Suffolk." St. 1860, c. 143.

Nothing in this section alters the rule of the common law, by which a grand jury may consist of thirteen or of any greater number not exceeding twenty-three. *Commonwealth v. Wood*, 2 Cush. 149, 150.

SECT. 2. This section applies only to the county of Suffolk. St. 1860, c. 143.

SECT. 9. "*The foreman shall under his hand return to the court a list of all witnesses.*" &c. This provision is merely directory, and the omission to return such list does not furnish any ground for quashing an indictment found and returned into court at the term when such omission occurred. *Commonwealth v. Edwards*, 4 Gray 1, 5.

SECT. 15. This section repealed and superseded by St. 1862, c. 223, ss. 17, 18.

SECT. 17. "*Alleged in the indictment,*" &c. The word "indictment" was not used here with the intention to exclude the case of prosecution by *complaint*. *Commonwealth v. Gillon*, 2 Allen 502.

SECTS. 22, 23. Repealed and superseded by St. 1869, c. 433.

SECT. 29. See *Commonwealth v. Lannan*, 13 Allen 563, 568.

*Additional Provisions.*

Two or more counts for different offences may be set forth in the same complaint or indictment, if they describe the same act. St. 1861, c. 181.

“Indictments against a street railway corporation for loss of life shall be prosecuted within one year from the time of the injury causing the death.” St. 1864, c. 229, s. 38.

For similar provision as to indictments against railroad corporations, see chapter 63, section 99.

Where an indictment against a corporation for a pecuniary penalty is abated, or judgment thereon is reversed, a new indictment may be found within one year thereafter. St. 1867, c. 164.

## CHAPTER CLXXII.

## OF TRIALS.

SECT. 3. The defendant in a criminal cause may challenge peremptorily two jurors. St. 1862, c. 84.

The right of a defendant to challenge peremptorily must be exercised before the jurors are interrogated as to their bias or opinions. *Commonwealth v. Webster*, 5 Cush. 295, 297. (A similar privilege was given to the commonwealth in such cases by St. 1867, c. 254. This act was, however, repealed by St. 1868, c. 70.)

In all criminal cases, when the offence charged is a capital one, or may be punished by imprisonment for life, the commonwealth may challenge five jurors peremptorily. On the trial of any other offence, it may challenge two peremptorily. St. 1869, c. 151.

SECT. 10. The words “written” and “certificate of” in this section struck out. St. 1864, c. 121.

As to the effect of this section, see *Commonwealth v. Livermore*, 2 Allen 292.

SECT. 12. Under this section an indictment for larceny of property pledged and in the possession of the pledgee may describe it as the property and in the possession of the pledger. *Commonwealth v. O'Hara*, 10 Gray 469.

So an indictment for larceny may describe the property stolen as owned by one who is in fact only a tenant in common thereof. *Commonwealth v. Arrance*, 5 Allen 517.

So an indictment for breaking and entering a shop will be good, though it describes such shop as the shop of one who in fact is a joint lessee thereof with another, and though by a mutual agreement between such lessees each occupies a distinct part of the shop, and it does not appear that the defendant broke and entered the part occupied by the person named. *Commonwealth v. Thompson*, 9 Gray 108.

See also *Commonwealth v. Norton*, 11 Allen 110.

SECT. 14. Provision for committal of insane persons to receptacle for insane criminals at the Tewksbury almshouse. St. 1864, c. 288, s. 10.

SECT. 15. See *Commonwealth v. Thorniley*, 6 Allen 445, 448.

SECT. 16. If a less offence is duly charged in an indictment, the case is within this section, even though one of the facts alleged is a necessary element of the smaller, but not of the larger offence. *Commonwealth v. Squiers*, 97 Mass. 59.

Under this section a person indicted for an assault with intent to murder, may be convicted and sentenced for an assault without felonious intent. *Commonwealth v. Lang*, 10 Gray 11.

SECT. 17. This section repealed and superseded by St. 1862, c. 228, ss. 17, 18.

SECT. 19. For further provisions on the subject of this section, see St. 1864, c. 250, ss. 1, 2.

*Additional Provisions.*

Act authorizing defendants in criminal cases to testify. St. 1866, c. 260.

As to the form of pleas of *autrefois acquit* or *convict*, see St. 1864, c. 250, s. 4.

## CHAPTER CLXXIII.

### OF APPEALS, NEW TRIALS, AND REPORTS.

#### *Appeals.*

(Exceptions or appeal not to stay proceedings, except, &c. St. 1864, c. 250, s. 5. Repealed by St. 1866, c. 228, s. 1.)

SECT. 3. "*A copy of the conviction and other proceedings in the case.*" As to the proper form of such copy, see *Commonwealth v. Cavey*, 97 Mass. 541. — *Commonwealth v. Hogan*, 11 Gray 313. — *Commonwealth v. Dow*, 11 Gray 316. — *Commonwealth v. Burns*, 8 Gray 482.

#### *Reports.*

SECT. 9. "*For his personal appearance at the supreme judicial court.*" The name of the court here inserted is an error, — the recognizance should be for appearance in the superior court. *Commonwealth v. Field*, 11 Allen 488, 497, 499.

SECT. 10. "*Shall render such judgment.*" If the court is of opinion that a verdict of guilty cannot be sustained upon a case reported, the proper judgment is that all further proceedings be stayed, and that the defendant be discharged and go without day. *Commonwealth v. Ordway*, 12 Cush. 270.

## CHAPTER CLXXIV.

### OF JUDGMENT AND EXECUTION.

"No motion in arrest of judgment shall be allowed for any cause existing before verdict, unless the same affects the jurisdiction of the court." St. 1864, c. 250, s. 3.

Persons under sentence may be committed by the supreme or superior court in one county to the house of correction in any other county. St. 1866, c. 280, s. 2.

SECT. 1. See *Commonwealth v. McDonough*, 13 Allen 581, 583.



SECT. 8. Similar provision for case where offender can show that he has not before been convicted of a similar offence. St. 1866, c. 280, s. 1.

SECT. 9. This section repealed and superseded by St. 1865, c. 44, s. 2.

SECT. 14. This section establishes a general rule applicable even to cases arising under subsequent statutes. See *Commonwealth v. Wyman*, 10 Cush. 237.

SECT. 18. Provision for postponement of solitary confinement in case of severe illness of convict. St. 1866, c. 254.

SECT. 22. Under the earlier practice in this state, the original mittimus was left with the jailer. *Townsend v. Babbitt*, 11 Gray 468.

*Additional Provision.*

“No person under the age of ten years shall be sentenced to a jail or house of correction, except for non-payment of fine, or of fine and costs.” St. 1865, c. 208, s. 1.

## CHAPTER CLXXV.

### OF INQUESTS ON DEAD BODIES.

Coroners required to return to clerks of the superior court evidence in cases of inquests. St. 1864, c. 28.

SECT. 17. As to the duty of a coroner with regard to property of a third person found upon a dead body, see *Smiley v. Allen*, 13 Allen 465.

## CHAPTER CLXXVI.

### OF FINES, FORFEITURES, AND COSTS.

SECT. 1. Altered by St. 1860, c. 191, s. 10.

SECT. 4. Altered by St. 1860, c. 191, s. 10.

SECTS. 5, 6. As to costs in cases before police courts and trial justices, see St. 1860, c. 191, ss. 7, 8.

SECT. 8. “ *And they shall transmit to the treasurer of the commonwealth,*” &c. These words and the remainder of the section struck out by St. 1861, c. 184.

SECT. 14. See St. 1860, c. 191, s. 10. — St. 1861, c. 184. — St. 1862, c. 144.

SECT. 15. See St. 1860, c. 191, s. 10.

SECT. 16. See St. 1861, c. 184.

SECT. 17. See St. 1860, c. 191, ss. 7, 8.

## CHAPTER CLXXVII.

### OF FUGITIVES FROM JUSTICE AND PARDONS.

#### *Fugitives from Justice.*

SECT. 3. See *Commonwealth v. Hall*, 9 Gray 262, 266.

#### *Pardons.*

SECTS. 13–16. Repealed and superseded by St. 1867, c. 301.

---

## TITLE III.

### OF PRISONS AND IMPRISONMENT.

WHEN his term of imprisonment ends on a Sunday, a convict to be discharged on the preceding Saturday. St. 1864, c. 194.

Provision for establishment of houses of reformation. St. 1856, c. 288, ss. 2–4.

## CHAPTER CLXXVIII.

### OF JAILS AND HOUSES OF CORRECTION.

#### *Jails.*

SECT. 1. Persons charged with desertion from the army of the United States, or from the volunteer forces of the United States, may be confined in jails. St. 1863, c. 155, s. 2.

*Third Clause.* "Persons committed for any cause authorized by law." See *Burnham v. Morrissey*, 14 Gray 226, 241.

SECT. 3. County commissioners may employ prisoners to labor upon public lands and buildings belonging to the county. St. 1863, c. 99.

*Houses of Correction.*

SECT. 6. Provision for removal of convicts from one house of correction to another in the same county. St. 1860, c. 164.

"*Except the county of Duke's county.*" As to persons sentenced in Duke's county, see St. 1862, c. 199.

SECT. 8. Repealed and superseded by St. 1862, c. 127.

SECT. 17. The provisions of this section made applicable to St. 1866, c. 235. St. 1866, c. 235, s. 5.

"*Or any police court.*" As to persons committed by police courts, see St. 1862, c. 189.

*Provisions respecting Jails, Houses of Correction, Prisoners, &c.*

SECT. 19. This section so amended "that the master of the house of correction in the county of Suffolk shall be appointed by the board of directors of public institutions of the city of Boston." St. 1865, c. 241.

SECT. 22. "*Except in the county of Suffolk.*" These words struck out by St. 1864, c. 270, s. 1.

As to pay of sheriff doing duty of jailer or master of house of correction, see St. 1860, c. 92.

SECT. 24. Records of property found in the possession of prisoners to be kept, and keeper of jail, &c., to be responsible, &c. St. 1861, c. 138.

SECT. 46. "*In any place of confinement established by law.*" An escape from lawful custody in any other place than those specified in this section, as an escape of a convicted criminal from the custody of an officer who is conducting him by virtue of a mittimus to the place of confinement, is punishable as an offence at common law. *Commonwealth v. Farrell*, 5 Allen 130.

SECT. 47. See Opinion of Justices, 13 Gray 618.

*Expense of Supporting Prisoners, &c.*

SECT. 61. See *Adams v. Hampden*, 13 Gray 439.

*Inspectors of Prisons.*

SECT. 62. “*And in the county of Suffolk the judge of the probate court and the justices of the police court.*” These words struck out by St. 1864, c. 311, s. 1.

SECT. 65. This section repealed by St. 1864, c. 311, s. 2.

*Returns.*

SECTS. 68–72. Repealed and superseded by St. 1864, c. 307. (A prior alteration was made by St. 1862, c. 220, now repealed by the above St. 1864, c. 307, s. 8.)

## CHAPTER CLXXIX.

### OF THE STATE PRISON.

*General Provisions.*

As to appropriations, payments, &c., for the state prison, see St. 1864, c. 303, ss. 2, 3.

Act authorizing expenditure of money for educational purposes in the state prison. St. 1869, c. 255.

Certain returns to be made concerning the state prison. St. 1864, c. 307, ss. 1, 2–5.

SECT. 1. As to persons convicted in the United States courts, see St. 1869, c. 334.

*Officers and Salaries.*

SECT. 13. See St. 1864, c. 303, s. 3. — St. 1867, c. 312.

*Inspectors.*

SECT. 18. See St. 1864, c. 303, s. 1.

*Warden and Deputy Warden.*

Warden to keep record of property found in the possession of prisoners, and to be responsible therefor. St. 1861, c. 138.

SECT. 29. See St. 1864, c. 303, ss. 2, 3.

*Discipline, &c., of Convicts.*

Warden may, when he deems it expedient, and with the consent of the inspectors, "allow the convicts to assemble together in the yard for recreation and exercise." St. 1869, c. 275.

*Record of Conduct.*

SECT. 51. See Opinion of Justices, 13 Gray 618.

*Discharged Convicts.*

SECT. 66. "*But the whole amount so paid for such expenditures shall not exceed five hundred dollars in any one year.*" This amount now raised to fifteen hundred dollars. St. 1869, c. 122. (Previously raised to one thousand dollars by St. 1861, c. 78, s. 1.)

SECT. 68. Salary of agent for discharged convicts raised to eight hundred dollars. St. 1861, c. 78, s. 2.

## CHAPTER CLXXX.

## OF THE TRANSFER OF LUNATICS AND DISCHARGE OF POOR CONVICTS.

*Lunatics in the State Prison.*

SECT. 1. Constitution of commission altered by St. 1862, c. 8.

*Lunatics in other Prisons.*

SECTS. 4, 5. See St. 1864, c. 288, s. 10.

*Discharge of Poor Convicts.*

SECT. 6. See *Gannon v. Adams*, 8 Gray 395.

SECT. 7. This section repealed and superseded by St. 1865, c. 44.

SECT. 8. This section repealed by St. 1866, c. 289.

*Additional.* Persons confined in jail for non-payment of fine and costs not exceeding \$10, may be discharged, if unable to pay, or if it is otherwise expedient. St. 1866, c. 284.



## PART V.

---

### OF THE GENERAL STATUTES AND THE REPEAL OF EXISTING LAWS.

---

#### CHAPTER CLXXXI.

##### OF THE GENERAL STATUTES AND THEIR EFFECT.

SECT. 4. See *Jewett v. Phillips*, 5 Allen 150, 151. — *Locke v. Johnson*, 3 Allen 153, 156. — *Bigelow v. Bemis*, 2 Allen 496, 498. — *Brigham v. Dole*, 2 Allen 49.

SECT. 6. See *Commonwealth v. Welsh*, 1 Allen 1.

#### CHAPTER CLXXXII.

##### OF THE EXPRESS REPEAL OF EXISTING LAWS.



## STATUTES OF 1860.

CHAPTER 60. Repealed and superseded by St. 1864, c. 137.

CHAPTER 65. Prior to this statute, a sewing machine of less than \$100 in value, and necessary for carrying on the trade or business of a debtor, was exempt from attachment under Gen. St. c. 133, s. 32. *Dowling v. Clark*, 1 Allen 283. And the effect of this statute may be in some cases to exempt a *second* sewing machine. *Rayner v. Whicher*, 6 Allen 292.

CHAPTER 78. For the cause of this statute, see *Grafton Bank v. Bickford*, 13 Gray 564.

This statute has been held to be unconstitutional, so far at least as it purports to affect cases in which the proceedings had been already adjudged void by the supreme court. *Denny v. Maltoon*, 2 Allen 361.

CHAPTER 86. Additional act. St. 1861, c. 8.

CHAPTER 89. Additional act. St. 1863, c. 117.

CHAPTER 93. Superseded by St. 1865, c. 114.

CHAPTER 109. The enlarging of a dwelling-house and fitting it up as a stable, is an "erection" of a building for a stable within the meaning of St. 1810, c. 124, which this statute amends. The St. 1810, c. 124, was not repealed by Gen. St. c. 88, s. 31. *Hastings v. Aiken*, 1 Gray 163.

CHAPTER 128. Repealed by St. 1862, c. 88.

CHAPTER 135. Obsolete. See St. 1869, c. 110.

CHAPTER 140. Repealed by St. 1862, c. 177, s. 7.

CHAPTER 147. Additional powers given to constables in Boston by St. 1869, c. 247.

CHAPTER 163. Repealed by St. 1863, c. 156, s. 2.

CHAPTER 165. Repealed and superseded by St. 1864, c. 212.

CHAPTER 166. Repealed by St. 1861, c. 136, s. 1. (St. 1861, c. 136, s. 1, having been repealed by St. 1869, c. 415, s. 65, this chapter was again repealed by St. 1869, c. 452.)

CHAPTER 167. As to the constitutionality, &c., of this statute, see *Commonwealth v. Cochituate Bank*, 3 Allen 42.

CHAPTER 189. As to the law prior to this statute, see *Arnold v. Sabin*, 4 Cush. 46, 47. — *Boynton v. Dyer*, 18 Pick. 1, 4.

CHAPTER 191. *Sect. 1. Fifth Clause.* This clause repealed by St. 1862, c. 216, ss. 1, 18.

*Sects. 2-5.* Repealed by St. 1862, c. 216, s. 18. (Prior alteration in provisions of section 3 by St. 1861, c. 146.)

CHAPTER 192. *Sect. 5.* See Resolve 41 of 1861.

CHAPTER 209. *Sects. 3, 4.* Amended by St. 1861, c. 72.

*Sect. 7.* This section suspended till 1st April, 1863, by St. 1862, c. 67. Till 1st April, 1864, by St. 1863, c. 115. Till 1st April, 1865, by St. 1864, c. 95. Till 1st April, 1866, by St. 1865, c. 124.

*Sect. 8.* By St. 1860, c. 214, it was provided that section 1 of this chapter should take effect on December 1st, 1860.

CHAPTER 211. Repealed by St. 1862, c. 140. (Additional act. St. 1861, c. 154.)

CHAPTER 215. Prior to this statute, it was not necessary that an affidavit for the arrest of a debtor on execution should state that the person making the affidavit had good cause to believe the facts therein set forth. *Abbott v. Tucker*, 4 Allen 72.

---

## STATUTES OF 1861.

CHAPTER 43. Repealed by St. 1861, c. 212.

CHAPTER 49. Probably superseded by St. 1864, c. 238, and St. 1866, c. 219. Section 1 previously amended by St. 1861, c. 143.

CHAPTER. 78. Amount of expenditures fixed by this chapter, further increased by St. 1869, c. 122.

CHAPTER 87. Superseded by St. 1867, c. 263.

CHAPTER 91. *Sects. 4, 5.* Obsolete,—the sections of the Gen. St. here referred to have been repealed by St. 1868, c. 24, s. 2.

CHAPTER 94. Repealed and superseded by St. 1866, c. 234.

CHAPTER 104. *Sect. 2.* “*And they shall sell the estate at public auction, unless,*” &c. It seems that this provision “is to be construed as directory merely, and not as rendering the title of bonâ fide purchasers void for any failure of the assignee to comply with its provisions.” *Tuite v. Stevens*, 98 Mass. 305, 307.

CHAPTER 120. Repealed and superseded by St. 1864, c. 201.

CHAPTER 121. Repealed and superseded by St. 1862, c. 210.

CHAPTER 130. Repealed by St. 1862, c. 139.

CHAPTER 132. Obsolete, see St. 1869, c. 110.—St. 1869, c. 423, s. 1.

CHAPTER 136. This chapter, except the first section, repealed by implication by St. 1868, c. 141. The whole chapter expressly repealed by St. 1869, c. 415, s. 65.

CHAPTER 143. Superseded by St. 1864, c. 238.

CHAPTER 144. Superseded by St. 1861, c. 197. See also St. 1862, c. 180, s. 2.

CHAPTER 146. Repealed by St. 1862, c. 216, s. 18.

CHAPTER 152. Repealed and superseded by St. 1864, c. 196.

CHAPTER 154. Obsolete, see St. 1862, c. 140.

CHAPTER 160. Repealed by implication by St. 1865, c. 228.

CHAPTER 164. The right of a widow, under this chapter,

to waive the provisions of her husband's will, is a personal right, and will not pass to her representatives in case of her death within the six months. *Sherman v. Newton*, 6 Gray 307.

For instances of the confusion which the waiver by a widow of the provisions of her husband's will may work among the other provisions of such will, and as to the course adopted by the court in such cases, see *Sturtevant v. Bowker*, 11 Met. 291. — *Plympton v. Plympton*, 6 Allen 178. — *Firth v. Denny*, 2 Allen 468. See also Gen. St. c. 92, ss. 36, 36. — *Blaney v. Blaney*, 1 Cush. 107. — *Lobdell v. Hayes*, 12 Gray 286.

A widow, to whom a legacy is given in lieu of dower, will be entitled, in case of a deficiency of assets, to be paid in full in preference to legatees who are mere volunteers. *Pollard v. Pollard*, 1 Allen 490.

For a case in which a husband, by assigning property in his lifetime to trustees, to pay the income to himself for life, and at his death to transfer the principal to certain charitable objects, diminished the share of his estate that could otherwise be claimed by his widow upon his decease, and thereby indirectly evaded the effect of this statute, see *Stone v. Hackett*, 12 Gray 227, 232.

See Gen. St. c. 90, s. 13, for a provision that a widow may claim dower after the six months, if she is deprived of the provision in lieu of dower made for her by will.

*"Unless it plainly appears by the will to have been the intention of the testator," &c.* As to what is sufficient to show such intention, see *Reed v. Dickerman*, 12 Pick. 146. — *Adams v. Adams*, 5 Met. 277. — *Pratt v. Felton*, 4 Cush. 174.

CHAPTER 165. Except as authorized by this statute, cities or towns have no authority to appropriate money for the celebration of holidays, as, for instance, the fourth of July (*Hood v. Lynn*, 1 Allen 103), or the anniversary of the surrender of Cornwallis (*Tash v. Adams*, 10 Cush. 252); nor to vote money

for the purchase of uniforms for an artillery company. *Claffin v. Hopkinton*, 4 Gray 502.

*“Provided that such appropriations shall be made by vote of two-thirds,” &c., &c.* If the records of a city council do not show that the provisions of the statute were complied with, the city will not be liable to a person wounded by a rocket discharged by its officers in celebrating a holiday. *Morrison v. Lawrence*, 98 Mass. 219, 221.

CHAPTER 167. Additional act. St. 1864, c. 210.

*Sect. 3. Item third* altered to “The total *value* of personal estate,” and *item fourth* to “The total *value* of real estate,” by St. 1861, c. 215.

CHAPTER 168. *Sect. 1.* Inspector to make report to legislature. St. 1864, c. 296.

CHAPTER 170. This statute “was not designed to change in any way the rules of the common law regulating the power of agents, or their authority to bind their principals, but only to declare that certain classes of persons should be deemed so far agents of insurance companies as to be liable to the penalty prescribed by Gen. St. c. 58, s. 77.” *Harrison v. City Fire Ins. Co.*, 9 Allen 231, 233.

CHAPTER 174. *Sect. 1.* This provision held to be constitutional in *Clarke v. Cordis*, 4 Allen 466.

Parties in being, having only future contingent interests, need not be parties to an agreement of compromise under this section. *Clarke v. Cordis*, 4 Allen 466.

*Sect. 2.* The provisions of this section made applicable “to all claims, whether the time for prosecuting the same had or had not expired at the time of the passage of” this act. St. 1863, c. 235.

This provision does not apply to claims which were barred at the time of its passage. *Garfield v. Bemis*, 2 Allen 445.

See a query as to the constitutionality of this section in *Prentice v. Dehon*, 10 Allen 353, 355.

*“Is not chargeable with culpable neglect.”* As to what is cul-

pable neglect within the meaning of this statute, see *Wells v. Child*, 12 Allen 333. — *Waltham Bank v. Wright*, 8 Allen 121. — *Jenny v. Wilcox*, 9 Allen 245. — *Bradford v. Forbes*, 9 Allen 365, 367. — *Richards v. Child*, 98 Mass. 284.

CHAPTER 181. This statute "was intended to permit the same criminal act to be variously described in different counts, the union of which at common law might otherwise have been held a misjoinder. Its object was not to impose upon the criminal pleader any new restrictions." *Commonwealth v. O'Connell*, 12 Allen 449, 451.

CHAPTER 194. Repealed by St. 1862, c. 208.

CHAPTER 195. Superseded by St. 1869, c. 43.

CHAPTER 199. See St. 1864, c. 229.

CHAPTER 207. See St. 1866, c. 296.

CHAPTER 209. See St. 1868, c. 166, s. 2.

CHAPTER 216. See St. 1861, c. 217. — St. 1861, c. 218. — St. 1862, c. 147. — St. 1864, c. 98.

CHAPTER 219. Repealed. St. 1866, c. 219, s. 189. (Previously amended by St. 1865, c. 154.)

CHAPTER 222. Repealed by St. 1865, c. 232, s. 6. (See also St. 1862, c. 66. For cases arising under this act, see *Grover v. Pembroke*, 11 Allen 88. — *Curtis v. Pembroke*, 11 Allen 92. — *James v. Scituate*, 11 Allen 93. — *Carr v. Warren*, 98 Mass. 329.)

#### RESOLVES.

CHAPTER 1. Salary of private secretary of governor raised to \$2,000 by St. 1866, c. 298, s. 4.

---

### STATUTES OF 1862.

CHAPTER 1. The operation of Gen. St. c. 57, s. 59, further suspended by St. 1862, c. 110. — St. 1863, c. 6. — St. 1864, c. 5. — St. 1865, c. 8.

CHAPTER 20. *Sect. 2.* A justice of the peace or police court has no power to allow a declaration to be filed after the entry of the writ. *Keenan v. Knight*, 9 Allen 257.

CHAPTER 36. As to the general purpose and effect of this statute, see *Heims v. Ring*, 11 Allen 352, 353.

*"In which the title to real estate may be concerned."* See *Willard v. Baker*, 2 Gray 336. — *Murray v. Watson*, 12 Cush. 457.

CHAPTER 48. Additional act. St. 1862, c. 153.

CHAPTER 59. See St. 1866, c. 249, s. 2.

CHAPTER 62. See St. 1863, c. 254, s. 4.

*Sect. 2.* Penalty on town treasurer or other officer for withholding money which he is required to disburse under this section, or for charging any commission thereon. St. 1864, c. 230.

CHAPTER 66. Repealed by St. 1865, c. 232, s. 6. (Section 2 previously amended by St. 1862, c. 186, s. 1.)

CHAPTER 81. A compliance with the provisions of this chapter will not excuse a railroad corporation from taking other reasonable precautions against accidents at crossings. *Bradley v. Boston & Maine R.R.*, 2 Cush. 539. — *Linfield v. Old Col. R.R.*, 10 Cush. 562.

*"Each locomotive engine passing upon its road."* This applies to engines upon a road leased by a corporation as well as to those upon one owned by it. *Linfield v. Old Col. R.R.*, 10 Cush. 562.

CHAPTER 84. Two or more persons, who are joined as plaintiffs or defendants in a civil cause, have, under this chapter, the right to challenge only two jurors in all, not two apiece. *Stone v. Segur*, 11 Allen 568.

CHAPTER 85. Repealed by St. 1866, c. 65, s. 3. (Previously amended by St. 1862, c. 176, s. 1. — St. 1865, c. 156.)

CHAPTER 86. Repealed by St. 1864, c. 201.

CHAPTER 93. *Sect. 3.* Repealed by St. 1864, c. 248.

CHAPTER 109. Similar act relative to certain other officers. St. 1867, c. 138. See also St. 1865, c. 231.

CHAPTER 111. Repealed by St. 1866, c. 219, s. 189.

CHAPTER 112. Repealed and superseded (except section 4), by St. 1864, c. 307.

CHAPTER 115. For the cause of this statute, see *Rice v. Nickerson*, 4 Allen 66, 70.

CHAPTER 135. *Sect. 2.* Railroad reports to be printed and distributed before the tenth of February in each year. St. 1864, c. 167, s. 4.

*Sect. 3.* Repealed by St. 1864, c. 167, ss. 1, 5.

CHAPTER 139. Repealed by St. 1866, c. 129, s. 3.

CHAPTER 151. Repealed by St. 1865, c. 232, s. 6.

CHAPTER 161. Altered by St. 1866, c. 249.

CHAPTER 164. Obsolete. See St. 1869, c. 96, and St. 1865, c. 243.

CHAPTER 165. Repealed by St. 1866, c. 224.

CHAPTER 166. Repealed by St. 1865, c. 232, s. 6.

CHAPTER 167. Repealed by St. 1866, c. 219, s. 189.

CHAPTER 174. Repealed by St. 1864, c. 201, s. 6.

CHAPTER 176. Liens on vessels under this law may be enforced in the United States district court in admiralty. The brig *America* (U. S. Dist. Ct. Mass. Dist.) 2 Am. Law Rev. 458.

*Sect. 6.* Pilots to collect and pay over to commissioners four per cent, instead of three per cent, as provided in this section. St. 1863, c. 75.

*Sect. 17.* This section repealed by St. 1869, c. 236, s. 1.

*Schedule. General regulations. Regulation 15.* Amended by order of governor and council, Jan. 3, 1867. See Blue Book of 1867, p. 876. Re-enacted in original form by St. 1869, c. 236, s. 2.

*Regulation 16.* Amended by order of governor and council, Oct. 23, 1866. See Blue Book of 1867, p. 876.

*Special regulations for harbor of Boston.* Amended by order of governor and council, Nov. 2, 1866.

*Special regulations for New Bedford and Fairhaven.*



Amended by order of governor and council, April 24, 1867. See Blue Book of 1867, p. 876.

*Special regulations for Provincetown.* The words "and who shall keep a decked boat, suitable for the purpose, not less than fifty tons" struck out. St. 1868, c. 180.

CHAPTER 179. *Sect. 1.* Schedules may, in certain cases, be delivered after the five days referred to in this section. St. 1863, c. 71.

CHAPTER 180. *Sect. 2.* Similar provision relative to elections prior to April 4, 1863. St. 1863, c. 180.

CHAPTER 181. As to the effect and validity of proceedings under this chapter, see *Hamilton Insurance Co. v. Parker*, 11 Allen 574. — *People's Mut. Eq. Fire Ins. Co.*, petitioners, 9 Allen 319.

*Sects. 1-3.* These sections to apply only to assessments made when the company is in danger of insolvency. St. 1864, c. 161. s. 2.

When an application is made to the supreme court under these sections, the court shall appoint an auditor, &c., &c. St. 1863, c. 249, s. 3.

CHAPTER 183. *Sect. 6.* Prior to this statute, the purchaser of an estate sold for taxes had no remedy against the town in case his title proved invalid by reason of any error, &c., in the proceedings. *Lynde v. Melrose*, 10 Allen 49.

*Sect. 10.* As to the fees to which a collector was entitled prior to this statute, see *Converse v. Jennings*, 13 Gray 77. — *Howard v. Proctor*, 7 Gray 128.

CHAPTER 184. See *Mayhew v. Gay Head*, 13 Allen 129.

CHAPTER 190. It seems that this statute does not, like Gen. St. c. 123, s. 55, require any entry in the clerk's office of the name of a person to whom the legal title of the land taken on execution has been fraudulently conveyed. *Clark v. Chamberlain*, 13 Allen 257.

CHAPTER 198. *Sect. 1.* Under this provision, a married woman who keeps a boarding-house must file a certificate as

here provided, in order to secure the furniture of such house against the creditors of her husband. *Chapman v. Briggs*, 11 Allen 546.

CHAPTER 203. Repealed and superseded by St. 1869, c. 303. (Previously modified by St. 1863, c. 108.)

As to the purpose and effect of this statute, see *Pickford v. Lynn*, 98 Mass. 491, 498.

CHAPTER 207. Police courts and trial justices to have jurisdiction of offences under this chapter. St. 1863, c. 44, s. 1.

(By St. 1866, c. 283, s. 5, it was provided that this act should not apply to the city of Boston. But St. 1866, c. 283, s. 5, was repealed by St. 1867, c. 156.)

*Sect. 1.* Towns may assign a house of reformation for those convicted as truants, &c. St. 1865, c. 208, s. 3.

*Sect. 2.* Children in Duke's county may be committed to the farm school in New Bedford. St. 1863, c. 128.

Minors imprisoned for truancy may be discharged under certain circumstances. St. 1863, c. 44, s. 2.

CHAPTER 209. *Sect. 3.* As to salaries of justice and clerk, see St. 1869, c. 359, s. 2.

CHAPTER 210. In case of failure to file the certificates, &c., required by this chapter, the officers of the corporation to be liable for debts contracted during the continuance of their failure or neglect. St. 1863, c. 246, s. 2. See also St. 1862, c. 218, ss. 1, 2.

CHAPTER 212. (See St. 1864, c. 99, which is repealed by St. 1866, c. 150.)

CHAPTER 213. Prior to the passing of this statute, bastardy cases could not be compromised in the manner here provided. *Wheelwright v. Sylvester*, 4 Allen 59.

CHAPTER 218. This chapter applies to corporations organized under general laws, as well as to those organized under special charters. *Peele v. Phillips*, 8 Allen 86.

This chapter is not to release corporations organized under

Gen. St. c. 61, from their obligation to file the certificates and publish the notices required by that chapter. St. 1863, c. 246, s. 1.

As to the effect of proceedings in insolvency against a corporation, upon the personal liability of its officers and stockholders, see *Johnson v. Somerville Dyeing & Bleaching Co.*, 15 Gray 216, 218.

A delivery by a stockholder of his certificate of stock, indorsed with a printed transfer, which is signed but not filled up, will not prevent his liability for debts subsequently contracted. *Johnson v. Somerville Dyeing & Bleaching Co.*, 15 Gray 216, 219.

As to whether officers of a corporation, who are compelled to pay its debts, can in any case recover contribution from the stockholders, see *Stone v. Fenno*, 6 Allen 579.

As to enforcing in this state the personal liability of a stockholder in a corporation established under the laws of another state, see *Erickson v. Neamith*, 4 Allen 233. — s. c. 15 Gray 221.

*Sect. 3.* Clerks, &c., of corporations, against which judgment has been recovered, required to disclose names of stockholders upon request. St. 1864, c. 219.

Provision authorizing a stockholder to appear and defend a suit against a corporation, when the object of such suit is to obtain a judgment, in order to enforce it against the stockholders. St. 1867, c. 36.

*Sect. 4.* It seems that, in a suit against stockholders under this section, they may deny the due organization of the corporation. *Utley v. Union Tool Co.*, 11 Gray 139.

*Sect. 9.* The objection that all the stockholders in a corporation have not been joined as defendants, cannot be taken by demurrer, but must, under this section, be taken by plea or answer. *Essex Co. v. Lawrence Machine Shop*, 10 Allen 352.

CHAPTER 219. Repealed by St. 1863, c. 41, s. 4.

CHAPTER 220. Repealed and superseded by St. 1864, c. 307.

CHAPTER 223. Additional act. St. 1864, c. 288.

*Sect. 3.* See St. 1864, c. 288, s. 7.

*"In the city of Boston, of the police court."* "Any judge of the municipal court of the city of Boston may, in the absence of the judge of probate for the county of Suffolk," commit insane persons, &c. St. 1867, c. 355, s. 1.

*Sect. 5.* *"The name and address of some one or more of his nearest relatives or friends."* For further provision as to the parties to be named, and as to the notice to be sent to them, see St. 1865, c. 268, s. 2.

*Sect. 6.* As to the mode of hearing applications for the commitment of insane persons, see *Amherst v. Shelburne*, 11 Gray 107.

*Sect. 8.* Amended by St. 1865, c. 268, s. 1.

*Sect. 9.* See St. 1864, c. 288, s. 6.

*Sect. 10.* See *Smith v. Lee*, 12 Allen 510.

*Sect. 11.* See St. 1863, c. 240, s. 9. — St. 1864, c. 138. — St. 1864, c. 288, s. 12.

*Sect. 17.* See St. 1864, c. 288, s. 10.

CHAPTER 224. *Sects. 1, 2.* Amended by St. 1868, c. 165, ss. 1, 2. — St. 1865, c. 283, s. 18.

*Sect. 3.* For new provision as to the Massachusetts Hospital Life Insurance Co., see St. 1865, c. 283, s. 18.

*Sect. 4.* This section has been held to be constitutional as imposing a tax on the franchises of the corporations to which it applies. *Commonwealth v. Provident Insurance for Savings*, 12 Allen 312. — s. c. 6 Wallace 611. — *Commonwealth v. People's Five Cents Savings Bank*, 5 Allen 428.

(The tax provided for in this section was raised to three-fourths of one per cent by St. 1863, c. 164. That act was, however, repealed by St. 1865, c. 267.)

(As to a deduction to be made from the tax here provided for, see St. 1864, c. 208, s. 7, repealed by St. 1865, c. 283, s. 20.)

As to the taxation of the Mercantile Savings Institution, see St. 1867, c. 160.

*Sect. 6.* Altered by St. 1868, c. 165, s. 2.

*Sect. 11.* See St. 1867, c. 52.

CHAPTER 226. *Sect. 1.* “ *One representative, being an inhabitant of the same.*” As to the constitutionality of this provision, requiring the representative to be an inhabitant of the district, see 3 Am. Law Rev. 410.

*Sect. 2.* Ward four in Boston transferred from district three to district four, and ward five transferred from district four to district three, by St. 1866, c. 59.

Town of Hudson added to district seven. St. 1866, c. 194, s. 1.

---

## STATUTES OF 1863.

CHAPTER 25. Repealed by St. 1864, c. 168, s. 3.

CHAPTER 38. This chapter does not legalize a vote of a town to pay money to persons who had already enlisted in the service of the United States. *Fowler v. Danvers*, 8 Allen 80.

Nor does it operate to revive a contract which had become extinct under St. 1861, c. 222. *Grover v. Pembroke*, 11 Allen 88.

CHAPTER 41. This chapter “amended so as to allow oaths to be administered, affidavits, depositions, and acknowledgment of deeds to be given and made, before any officer in the regular or volunteer service of the United States *above the rank of lieutenant.*” St. 1864, c. 262.

*Sect. 2.* “ *By the paymaster.*” It seems that the word “ *by* ” should be “ *before.* ”

CHAPTER 65. Additional act. St. 1863, c. 229.

CHAPTER 78. Repealed and superseded by St. 1866, c. 280, ss. 3, 4. (Previously amended by St. 1865, c. 269, s. 2. — St. 1865, c. 281.)

CHAPTER 79. Repealed by St. 1865, c. 232, s. 6.

CHAPTER 91. Additional acts. St. 1863, c. 222. — St. 1863, c. 252. — St. 1864, c. 78. — St. 1865, c. 82.

*Sect. 1. Last Clause.* For a case of a criminal prosecution arising under this provision, see *Commonwealth v. White*, 9 Allen 195.

*Sect. 2.* "So much of" this section "as provides for the payment of a bounty of fifty dollars" repealed by St. 1863, c. 254, s. 10.

*Sect. 3.* Repealed by St. 1863, c. 254, s. 10.

CHAPTER 100. Superseded by St. 1864, c. 229, s. 21.

CHAPTER 108. Repealed by St. 1869, c. 303, s. 2.

CHAPTER 113. Superseded by St. 1864, c. 299.

For the reason for the enacting of this statute, see *Commonwealth v. Brimblecom*, 4 Allen 584.

CHAPTER 119. Repealed by St. 1864, c. 201, s. 6.

CHAPTER 127. *Sect. 5.* This section is in adoption of the decision in *Southward v. Kimball*, 5 Allen 301.

CHAPTER 139. Repealed by St. 1864, c. 202, s. 3.

CHAPTER 140. Repealed and superseded by St. 1864, c. 212.

CHAPTER 157. *Sect. 1.* This provision did not alter the law previously existing. Justices might, prior to this statute, take acknowledgments in any county. *Learned v. Riley*, 14 Allen 109.

*Sect. 2.* This changes the rule as laid down in *Heath v. Tenney*, 3 Gray 380, and earlier cases.

CHAPTER 164. So much of this chapter as applies to savings banks, repealed by St. 1865, c. 267.

CHAPTER 165. Prior to this statute a married woman might enter into a partnership of which her husband was not a member. *Plumer v. Lord*, 5 Allen 560. — s. c. 8 Allen 481.

CHAPTER 167. Repealed by St. 1866, c. 219, s. 189.

CHAPTER 171. Superseded by St. 1865, c. 191.

CHAPTER 176. Repealed by St. 1865, c. 232, s. 6.

CHAPTER 180. *Sect. 1.* This section "so amended that the same shall not apply to the trial of any cause in the supreme judicial court." St. 1864, c. 214.

If a judge, in a criminal case, fails to reduce his instructions to writing before the jury retire, as required by this section, such omission will furnish to the defendant no ground for exception, if he did not request the judge so to do, and if he has sustained no injury by the omission. *Commonwealth v. Barry*, 11 Allen 263.

*Sect. 2.* This section does not annul the 34th rule of the superior court, so far as it requires a defendant to allege his exceptions *before the jury are sent out*, — it "merely excuses him from alleging them thus early *in writing*." *Lee v. Gibbs*, 10 Allen 248.

CHAPTER 181. Salary of adjutant general raised to \$2,500 for the year 1865. St. 1865, c. 247, s. 3.

CHAPTER 184. *Sect. 1.* See St. 1864, c. 290, s. 2.

CHAPTER 193. Superseded by St. 1864, c. 229, and repealed by St. 1866, c. 219, s. 189.

CHAPTER 198. Elections in 1864 not to be invalid because check list not used. St. 1864, c. 195. So also of those in 1865, if held before May 1. St. 1865, c. 182.

CHAPTER 217. *Sect. 2.* Repealed and superseded by St. 1868, c. 327, ss. 1, 3.

CHAPTER 218. As to the constitutionality of this chapter, see *Lowell v. Oliver*, 8 Allen 247.

CHAPTER 223. Superseded by St. 1864, c. 229, ss. 29-32.

CHAPTER 231. *Sect. 1.* See St. 1865, c. 259, s. 1.

*Sect. 2.* "The fee for filing and recording certificates of organization or of increase of capital stock shall be five dollars." St. 1865, c. 76.

CHAPTER 236. This statute held to be unconstitutional in *Oliver v. Washington Mills*, 11 Allen 268. Repealed by St.

1864, c. 208, s. 18. The treasurer of the commonwealth "authorized to repay all sums of money received by him from any corporation under the provisions of" this chapter. St. 1867, c. 42.

CHAPTER 239. Repealed by St. 1864, c. 269.

CHAPTER 240. Additional act for appointment of agent to visit, &c., children maintained by the state, or indentured, &c., by authorities of any state institution, &c., &c. St. 1869, c. 453.

*Sect. 2.* Additional duties of general agent. St. 1869, c. 463, s. 5.

*Sect. 3.* For additional duties of the secretary of the board of state charities, see St. 1864, c. 307, ss. 1, 2.

Salary of secretary raised to \$3,000 by St. 1869, c. 453, s. 7.

*Sect. 4.* Duties of board of state charities regarding certain insane persons. St. 1864, c. 288, ss. 7, 12. Regarding Indians. St. 1869, c. 463, s. 4.

*Sect. 6.* Additional provisions as to alien passengers. St. 1869, c. 251.

*Sect. 7.* Compensation of general agent raised to \$3,000 per annum. St. 1866, c. 298, s. 5.

*Sect. 9.* See St. 1864, c. 138. — St. 1864, c. 288, s. 12.

CHAPTER 242. This chapter does not apply to contracts which were in existence at the time of its enactment. *North Bridgewater Bank v. Copeland*, 7 Allen 189.

CHAPTER 243. Superseded by St. 1864, c. 238, — expressly repealed by St. 1866, c. 219, s. 189.

CHAPTER 244. Additional acts. St. 1864, c. 190. — St. 1865, c. 163. — St. 1866, c. 223.

*Sect. 3.* This section "so amended that the bank commissioners shall determine and certify to the directors, what was the fair market value of the shares of such bank at the time of making the certificate required by the laws of the United States." St. 1864, c. 190, s. 4.



CHAPTER 245. *Sect. 1.* Altered by St. 1863, c. 169.

CHAPTER 247. Repealed by St. 1864, c. 201, s. 6.

CHAPTER 249. As to the effect and validity of proceedings under this chapter, see *Hamilton Mutual Insurance Co. v. Parker*, 11 Allen 574.

*Sect. 3.* See St. 1864, c. 161, s. 2.

CHAPTER 252. This chapter is not repealed by U. S. St. 1865, c. 79. *Commonwealth v. McGovern*, 10 Allen 193, 196.

*Sect. 1.* Amended by St. 1864, c. 78.

For cases of indictments under this section, see *Commonwealth v. McGovern*, 10 Allen 193, 195. — *Commonwealth v. White*, 9 Allen 195. — *Commonwealth v. Jacobs*, 9 Allen 274.

CHAPTER 254. Additional and amendatory acts. St. 1864, c. 48. — St. 1864, c. 65. — St. 1864, c. 84. — St. 1864, c. 130. — St. 1864, c. 143. — St. 1864, c. 211. — St. 1864, c. 232. — St. 1864, c. 292. — St. 1864, c. 313. — St. 1865, c. 82. — St. 1865, c. 151. — St. 1865, c. 180. — St. 1865, c. 274. — St. 1866, c. 84. — St. 1866, c. 139.

*Sect. 1.* “*Provided, however,*” &c. See *Commonwealth v. Cutter*, 13 Allen 393, 395.

## STATUTES OF 1864.

CHAPTER 15. Superseded by St. 1864, c. 238.

CHAPTER 47. Repealed by St. 1865, c. 232, s. 6.

CHAPTER 62. See St. 1869, c. 76. — St. 1868, c. 130.

CHAPTER 79. *Sect. 1.* An indictment under this statute should state the precise number of persons entertained, and should negative that they were travellers, &c. *Commonwealth v. Maxwell*, 2 Pick. 139.

CHAPTER 99. Repealed by St. 1866, c. 150.

CHAPTER 111. *Sect. 1.* See Gen. St. c. 112, ss. 11, 33.

*Sect. 2.* See *Joannes v. Underwood*, 6 Allen 240. See also St. 1866, c. 220.

CHAPTER 120. *Sect. 1.* Amended by St. 1865, c. 108.

See also *Hatch v. Attleborough*, 97 Mass. 533. — *Rand v. Worcester*, 98 Mass. 126. — *Vrancx v. Ross*, 98 Mass. 591, 594.

CHAPTER 122. This statute is not unconstitutional for the reason that it makes it a criminal offence to sell pure milk mixed with pure water. *Commonwealth v. Waite*, 11 Allen 264.

Additional act. St. 1869, c. 150. (Other additional acts now repealed. St. 1865, c. 194. — St. 1868, c. 263.)

*Sect. 2.* “*A certificate of such result, sworn to by the analyzer, shall be admissible in evidence,*” &c. See *Commonwealth v. Waite*, 11 Allen 264, 266.

*Sect. 3.* “*All acts and parts of acts, which require the sealing of cans in which milk is transported or sold, are hereby repealed.*” St. 1867, c. 204.

No action lies to recover the price of milk sold by the can in cans not sealed as required by law, even though the state sealer refused to seal them for the statute price. *Miller v. Post*, 1 Allen 434.

*Sect. 4.* As to the form of indictments under this section, see *Commonwealth v. Nichols*, 10 Allen 199. — *Commonwealth v. Farren*, 9 Allen 489. — *Commonwealth v. McCarron*, 2 Allen 157. — *Commonwealth v. O'Donnell*, 1 Allen 593.

CHAPTER 137. *Sect. 1.* “*Heretofore or hereafter made.*” It seems that this provision, making the statute applicable to *past sales*, is not unconstitutional. See *Cooper v. Robinson*, 2 Cush. 184, 190.

“*By an executor, administrator, guardian, trustee, or other person.*” Quære, whether the words “*or other person*” render it unnecessary that the person purporting to sell as executor, &c., should ever have been duly appointed as such. If they do not have this effect, it would seem to be a question whether the

mere failure of an executor to give the bond required by Gen. St. c. 93, s. 2, might not invalidate all sales made by him. See notes to Gen. St. c. 93, s. 2.

*"On account of the deed not having been delivered within one year after the license."* If the deed be not delivered within the year, the sale will be void, unless the case be brought within the provisions of this section. See *Richmond v. Gray*, 3 Allen 25, 27. — *Macy v. Raymond*, 9 Pick. 285.

*"Or on account of any irregularity in the proceedings."* As to what defects in the proceedings may properly be called *irregularities*, quære. It seems that any thing so important as the omission to deliver the deed within the year is not to be deemed a mere "*irregularity*," else why is that defect specially mentioned in this chapter, and why was St. 1840, c. 97, enacted when Rev. St. c. 71, s. 38, and c. 72, s. 20, were already in force?

*"First. That the license was granted by a court of competent jurisdiction."* It is provided by Gen. St. c. 117, s. 4, that the jurisdiction assumed in any case by a probate court, "so far as it depends on the place of *residence* of a person, shall not be contested in any suit or proceeding, except in an appeal in the original case, or where the want of jurisdiction *appears on the same record*."

The jurisdiction of a probate court may be ousted by the fact that the *judge is interested* in the case. See Gen. St. c. 119, s. 4, and notes to the same.

A license will not be granted by a court of competent jurisdiction, if it be granted by a court other than that by which the executor, administrator, or guardian obtaining the license was originally appointed. See Gen. St. c. 102, ss. 2, 37.

*"Second. That the person licensed gave a bond," &c.* In order to satisfy this requirement, it will be necessary not only that the instrument purporting to be the bond should be approved by the judge, but that it should also bear a *seal* and be signed by the person licensed.

*“Third. That the notice of the time and place of sale was given according to the order of court.”* It would seem that this requirement will not be complied with, unless the notice contains a description of the premises to be sold, sufficiently accurate and full to enable parties, who may wish to purchase, to identify the estate. See, as to the fulness of description required, *Wyman v. Hooper*, 2 Gray 141, 147.

The proper evidence that the notice has been duly given is afforded by an affidavit of the executor, &c., making the sale, filed in the probate office pursuant to Gen. St. c. 102, ss. 16, 41.

In the absence of all evidence that the notice has been given, no presumption to that effect will be made within thirty years. *Thomas v. Le Baron*, 8 Met. 355, 364.

*“Fourth. That the premises were sold accordingly, at public auction, and are held by one who purchased them in good faith.”* The statutes do not provide any method of perpetuating legal evidence of these facts. It may be well, however, to insert allegations on these points in the affidavit regarding the notice. The deed ought to recite that the premises have been sold at public auction.

See Gen. St. c. 101, s. 3, for a provision that “where an executor or administrator is removed, or letters of administration are revoked, all previous sales, whether of real or personal estate, made lawfully by the executor or administrator and with good faith on the part of the purchaser,” “shall remain valid and effectual.”

See also Gen. St. c. 102, s. 46, for a provision limiting the time, within which an action may be brought to set aside a sale by an executor, administrator, or guardian, to five years next after the sale or the termination of the guardianship, except in certain specified cases.

CHAPTER 143. *Sects. 1, 2.* Repealed by St. 1865, c. 232, s. 6.

CHAPTER 144. Repealed by St. 1865, c. 68, s. 2.

CHAPTER 152. Repealed by St. 1865, c. 239, s. 3.

CHAPTER 161. *Sect. 1.* See St. 1864, c. 308, s. 2.

CHAPTER 167. *Sect. 3.* Where a railroad is leased to a corporation or party in another state, the lessor is to make the returns and payments. St. 1867, c. 127.

CHAPTER 168. See St. 1868, c. 287.

*Sect. 1.* “*The supreme judicial court may,*” &c. Concurrent jurisdiction given to probate courts. St. 1869, c. 331.

CHAPTER 173. Where a minor or person under guardianship is a necessary party to a compromise under this chapter, he shall be represented by his guardian or by a guardian ad litem. St. 1865, c. 186.

CHAPTER 190. *Sect. 1.* See St. 1865, c. 185.

CHAPTER 196. This statute appears to have been enacted by reason of the decision in *Barre Boot Co. v. Milford Mutual Fire Insurance Co.*, 7 Allen 42.

*Sect. 1.* “*The conditions of the insurance shall be stated in the body of the policy.*” It is not necessary, however, that the body of the policy should contain the full and complete terms of such conditions;—to a certain extent it may refer for details to other documents. See *Eastern R.R. v. Relief Fire Insurance Co.*, 98 Mass. 420, 425. — *Campbell v. Charter Oak Insurance Co.*, 7 Allen 45, note.

CHAPTER 198. See St. 1864, c. 276.

CHAPTER 201. The returns required by this chapter need not be made by a corporation which complies with St. 1865, c. 283. St. 1865, c. 283, s. 19.

*Sect. 4.* For a case of an action to recover a penalty under a similar statute provision, see *Wheeler v. Goulding*, 13 Gray 539.

CHAPTER 208. This chapter superseded by St. 1865, c. 283.

Provision for conforming taxes assessed in 1864 to the provisions of this chapter. St. 1864, c. 294.

Treasurer of the commonwealth to print abstracts of returns made under this chapter. St. 1864, c. 279.

Nothing in this chapter to exempt shareholders from taxation for school district and parish purposes. St. 1866, c. 196.

As to the constitutionality of this mode of taxing corporations, see *Hamilton Co. v. Massachusetts*, 6 Wallace 632.—*Commonwealth v. Hamilton Manufacturing Co.*, 12 Allen 298.—*Commonwealth v. Lowell Gas Light Co.*, 12 Allen 76.—*Commonwealth v. New England Slate & Tile Co.*, 13 Allen 391.

CHAPTER 209. Salary of justice of municipal court of Taunton raised to \$1,200,—of clerk, to \$800. St. 1869, c. 359, s. 1.

CHAPTER 216. It is within the discretion of a judge, under this chapter, to authorize a woman to marry again, simply upon proof that since her divorce she has maintained a good character and is a fit person to marry. *Cochran, Petitioner*, 10 Allen 276.

CHAPTER 218. Repealed by St. 1866, c. 210.

CHAPTER 229. As to the general nature of the rights, &c., of street railway companies, see *Metropolitan R.R. Co. v. Quincy R.R. Co.*, 12 Allen 262, 269.

Street railway companies required to erect and maintain guards or railings upon bridges over which their tracks are located. St. 1869, c. 306.

*Sect. 16.* In the exercise of the power given to the board of aldermen of a city to make "regulations as to the removal of snow and ice from" the tracks of street railway companies, they may prohibit the removal of such snow and ice at any and all times, or they may require and permit such removal to be made only when it is allowed, and in a manner to be designated by the superintendent of streets or other officer having charge of the condition or repair of streets. *Union Railway Co. v. Mayor, &c., of Cambridge*, 11 Allen 287.

*Sect. 18.* Repealed and superseded by St. 1866, c. 286.

*Sect. 22.* For a case of an indictment for obstructing a horse railroad company, see *Commonwealth v. Hicks*, 7 Allen 573.

*Sect. 24.* This section prohibits a *mortgage* as well as an absolute sale. *Richardson v. Sibley*, 11 Allen 65, 70.

*Sect. 26.* Penalty of from \$5 to \$20 for violations of this section. St. 1865, c. 261.

*Sect. 27.* Penalty for violations of this section. St. 1865, c. 261.

*Sect. 29.* For a case arising under this section, see *Metropolitan R.R. Co. v. Quincy R.R. Co.*, 12 Allen 262.

*Sect. 38.* See St. 1867, c. 164.

*Sect. 43.* Supreme court may issue injunctions, &c., on application of the mayor and aldermen of any city or the selectmen of any town, to enforce laws, &c., &c., &c. St. 1866, c. 294.

CHAPTER 234. See St. 1865, c. 219.

CHAPTER 238. This chapter repealed and superseded by St. 1866, c. 219. (Amended before repeal by St. 1865, c. 19, and St. 1865, c. 250.)

CHAPTER 239. Repealed by St. 1866, c. 75. (Previously amended by St. 1865, c. 136. — St. 1865, c. 271.)

CHAPTER 250. *Sect. 1.* This provision not unconstitutional. *Commonwealth v. Hall*, 97 Mass. 570, 573.

The omission, in an indictment for uttering a forged order for money, to set forth or allege that it bore a United States revenue stamp, cannot under this section be taken advantage of at the trial. *Commonwealth v. McKean*, 98 Mass. 9.

*Sect. 2.* This section is not unconstitutional. *Commonwealth v. Walton*, 11 Allen 238.

The decision of a judge of the superior court, overruling a motion to quash made pursuant to this section, is subject to exception. *Commonwealth v. McGovern*, 10 Allen 193.

“*For any formal defect,*” &c. As to what is a “formal” defect within the meaning of the statute, see *Commonwealth v. Walton*, 11 Allen 238. — *Commonwealth v. Emmons*, 98 Mass. 6.

Under this section formal objections to a complaint, on which a conviction has been had in a police court, cannot be made for the first time after the case has been brought to the

superior court by appeal. *Commonwealth v. Norton*, 13 Allen 550.

*Sect. 5.* Repealed by St. 1866, c. 228.

CHAPTER 265. Repealed, and no right, title, or proceeding to be affected by reason of any failure or omission to comply with the requirements of this chapter. St. 1865, c. 254.

CHAPTER 288. *Sect. 13.* Repealed by St. 1867, c. 168.

CHAPTER 292. Repealed by St. 1865, c. 180.

CHAPTER 293. Repealed, saving rights under forfeitures already incurred. St. 1868, c. 56.

CHAPTER 299. Superseded by St. 1867, c. 130. Previously amended by St. 1864, c. 305. — St. 1865, c. 197.

CHAPTER 304. *Sect. 1.* “*Acting only in a representative capacity.*” An executor, who asks in his probate account for an allowance of his private claim for services rendered to his testator in his lifetime, is not “acting only in a representative capacity” within the meaning of this section. *Ela v. Edwards*, 97 Mass. 318.

*Sect. 2.* The provisions of this section “extended to cases where a deposition has been taken in perpetuum, if the deposition shall afterwards be used, on the trial of a cause in which the deponent or any legal representative of the deponent is a party, on behalf of such party.” St. 1867, c. 212.

CHAPTER 306. Upon proceedings under this chapter any question of title by disseisin should be tried and determined before the appointment of the commissioners. *Wonson v. Wonson*, 14 Allen 71.

Flats granted by the commonwealth, lying beyond the outer lines of riparian proprietors, may be divided in the manner provided in this chapter. St. 1867, c. 205.

CHAPTER 307. *Sections. 6, 7.* As to records and returns required to be made by overseers of the poor, see St. 1867, c. 209, which act (section 5) repeals these two sections.



CHAPTER 313. *Sect. 2.* So much of the scrip as the governor and council may deem expedient, may be expressed in sterling currency of Great Britain. St. 1865, c. 32.

---

## STATUTES OF 1865.

CHAPTER 19. Repealed by St. 1866, c. 219, s. 189.

CHAPTER 42. As to the course of proceedings in equity, prior to this statute, see *Pingree v. Coffin*, 12 Gray 288, 317.

CHAPTER 46. Repealed and superseded by St. 1869, c. 246.

CHAPTER 82. *Sect. 2.* This section to include soldiers who died, after muster out or discharge, of disease contracted in the service in their line of duty, also to those discharged for disability, but whose papers do not show the fact. St. 1866, c. 84, ss. 1, 3. Also those permanently disabled, though their discharge is not for that cause. St. 1866, c. 139.

CHAPTER 96. Repealed by St. 1866, c. 138, s. 2.

CHAPTER 101. *Sect. 1.* "*Provided that such percentage shall not be allowed, except upon the amount actually collected.*" As to the earlier law on this point, see *Boswell v. Dingley*, 4 Mass. 411.

CHAPTER 113. For the law prior to this statute, see *Wild v. Dean*, 3 Allen 579. — *Robb v. Mudge*, 14 Gray 534.

*Sect. 1.* For a case arising under this section, see *Bucklin v. Bucklin*, 97 Mass. 256.

CHAPTER 122. Additional acts. St. 1865, c. 284. — St. 1869, c. 91. — St. 1869, c. 293.

CHAPTER 142. A town maintaining a high school, under Gen. St. c. 38, s. 2, not less than thirty-six weeks, "shall not be liable to the forfeiture provided in" this section. St. 1866, c. 208, s. 2.

CHAPTER 143. Repealed by St. 1865, c. 271, s. 3.

CHAPTER 152. Repealed by St. 1866, c. 70.

As to the constitutionality of this chapter, see *Freeland v. Hastings*, 10 Allen 570, 578.

See also regarding the force and effect of this statute, *Shepard v. Turner*, 13 Allen 92. — *Andrews v. Prouty*, 13 Allen 93. — *Estey v. Westminster*, 97 Mass. 324. — *Cole v. Bedford*, 97 Mass. 326.

CHAPTER 157. Obsolete, the statute authorizing the issue of passports, &c., having been repealed by St. 1869, c. 365.

CHAPTER 158. Repealed by St. 1869, c. 246, s. 10.

CHAPTER 162. *Sect. 2.* Amended by inserting after the words "board of state charities," the words "or some person designated by them, whose duty it shall be to make suitable investigation." St. 1869, c. 12.

CHAPTER 163. *Sect. 1.* For new provision regarding the notice mentioned in this section, see St. 1866, c. 223.

CHAPTER 191. *Sect. 3.* This provision renders it necessary for the seller of coal, when bringing an action for the price, to prove the weighing, &c. *Libby v. Downey*, 5 Allen 299.

CHAPTER 194. Repealed by St. 1869, c. 150, s. 4.

CHAPTER 197. Superseded by St. 1867, c. 130.

CHAPTER 207. "*Shall not prevent any party to the suit or proceeding from being a witness in the case.*" That is, any party who made the contract with the agent. This section has no application to the case of a suit by an agent against the representatives of his deceased principal. In such a case the agent cannot be a witness in his own behalf. *Brown v. Brightman*, 11 Allen 226.

*Sect. 2.* "*Whenever the contract or cause of action in issue and on trial was made or transacted with the wife,*" &c. See *Bliss v. Franklin*, 13 Allen 244.

See also as to the effect of this section, *Burke v. Savage*, 13 Allen 408.

CHAPTER 223. See St. 1868, c. 141, s. 26. Expressly repealed by St. 1869, c. 415, s. 65.

CHAPTER 230. This law not unconstitutional because it changes the rules of settlement, and has the effect of transferring from one town to another the obligation to support paupers. *Bridgewater v. Plymouth*, 97 Mass. 382, 390.

*Sect. 1. "The quota of any city or town."* See *Bridgewater v. Plymouth*, 97 Mass. 382.

*"For a term not less than one year."* Continuous service for one year not required. St. 1866, c. 288.

Proviso at end of this section amended by St. 1868, c. 328, s. 3.

CHAPTER 232. Additional acts. St. 1865, c. 251. — St. 1866, c. 172.

CHAPTER 242. Additional acts. St. 1867, c. 188. — St. 1868, c. 349.

Shares of national banks, situated in this state, are legally taxable, to stockholders residing here, in the town in which they reside. *Austin v. Boston*, 14 Allen 359. This decision has since been affirmed by the supreme court of the United States.

CHAPTER 243. Repealed by St. 1869, c. 96.

CHAPTER 244. Repealed by St. 1866, c. 285, s. 4.

CHAPTER 246. Superseded by St. 1867, c. 276. See also St. 1866, c. 150.

CHAPTER 247. Superseded by St. 1866, c. 298, ss. 3, 5.

CHAPTER 249. Additional act. St. 1866, c. 261.

*Sect. 1.* Appointment of additional deputies authorized. St. 1867, c. 177.

*Sect. 2.* The state constable and his deputies may also serve process under Gen. St. cc. 71, 72. St. 1866, c. 292, s. 2.

Under this section they may serve warrants of search for intoxicating liquors under Gen. St. c. 86, s. 42, also warrants for service of notice issued under Gen. St. c. 86, ss. 46, 54. *Commonwealth v. Certain Intoxicating Liquors*, 97 Mass. 601.

*Sect. 3.* Salary of state constable raised to \$3,000. St. 1867, c. 349.

Members of state police not to receive fees for travel or attend-

ance as witnesses, but all fees earned by them shall be paid to the treasurers of the several counties. St. 1868, c. 388.

CHAPTER 250. Repealed by St. 1866, c. 219, s. 189.

CHAPTER 255. Obsolete. See St. 1869, c. 110. — St. 1869, c. 423, s. 1.

CHAPTER 269. Superseded by St. 1866, c. 280, s. 3.

CHAPTER 271. Repealed by St. 1866, c. 75.

CHAPTER 277. See St. 1866, c. 252.

This statute has no application to exclusion from places *not licensed*. *Commonwealth v. Sylvester*, 13 Allen 247.

CHAPTER 281. Repealed by St. 1866, c. 280, ss. 3, 4.

CHAPTER 283. This act not to be construed to exempt shareholders from taxation for school district and parish purposes. St. 1866, c. 196.

Tax commissioner to make to assessors of towns annual returns of corporations taxable under this chapter. St. 1867, c. 188, s. 2.

*Sect. 1. "Machinery."* Gas pipes owned by a gas-light company, and used for the purpose of distributing gas through the streets, and the meters used for measuring the gas to the consumers, are to be deemed "machinery" within the meaning of this section. *Commonwealth v. Lowell Gas Light Co.*, 12 Allen 75, 78.

The failure of assessors to make the returns required of them by this section will not defeat the right to levy the tax. *Commonwealth v. New England Slate and Tile Co.*, 13 Allen 391.

*Sect. 3. "Every corporation \* \* \* having a capital stock divided into shares."* This does not include a mutual life insurance company having an unredeemed guaranty capital, although such capital is divided into shares. *Commonwealth v. Berkshire Life Insurance Co.*, 98 Mass. 25.

*Sect. 4.* It seems that the determination of the tax commissioner under this section, as to the cash value of the stock of a corporation, is not open to modification or revision by any

other tribunal. *Commonwealth v. Cary Improvement Co.*, 98 Mass. 19, 21.

*Sect. 5.* As to the constitutionality of this tax, see *Hamilton Co. v. Massachusetts*, 6 Wallace, 632. — *Commonwealth v. Hamilton Manufacturing Co.*, 12 Allen 298. — *Commonwealth v. Lowell Gas Light Co.*, 12 Allen 75, 76. — *Commonwealth v. New England Slate and Tile Co.*, 13 Allen 391. — *Commonwealth v. Cary Improvement Co.*, 98 Mass. 19.

*Sect. 8.* When the tax commissioner is satisfied that a corporation taxed under this section is doing no business, and has applied for a dissolution, or for a reduction of its capital stock, he may abate its tax, &c. St. 1867, c. 299.

*Sects. 9–11.* These sections do not apply to corporations incorporated in other states. St. 1866, c. 291, ss. 2, 3.

*Sect. 12.* Salary of deputy tax commissioner raised to \$2,000. St. 1866, c. 298, s. 4.

Salary of first clerk to be \$1,500. St. 1866, c. 298, s. 4.

*Sect. 14.* Corporations failing to make returns *liable to injunction* on application of tax commissioner. St. 1866, c. 291, s. 1.

When the tax remains due for ten days after notice, the treasurer may issue a warrant for its collection. St. 1867, c. 52.

*Sect. 15.* So much of this section as exempts shares in corporations incorporated under the authority of other states from assessment and taxation in any city or town, repealed by St. 1866, c. 291, ss. 2, 3.

---

## STATUTES OF 1866.

CHAPTER 9. See, for cause of this statute, *Day v. Otis*, 8 Allen 477.

CHAPTER 47. This chapter applies to actions in the municipal court of the city of Boston. St. 1869, c. 17, s. 3.

CHAPTER 84. *Sect. 1.* This section amended by St. 1866, c. 139.

CHAPTER 113. Repealed by St. 1867, c. 215. Prior to this statute, a street railway corporation could not be the subject of proceedings in insolvency. Central Nat. Bank of Worcester v. Worcester Horse R.R. Co., 13 Allen 105.

CHAPTER 116. Superseded by St. 1868, c. 213.

CHAPTER 172. Additional acts. St. 1866, c. 282. — St. 1867, c. 136. — St. 1868, c. 107.

CHAPTER 174. The provisions of this act made applicable to other cities. St. 1868, c. 75. Also to towns, provided, &c. St. 1869, c. 169.

Provision for removal of buildings, extending over line of street, to adjoining land of same owner. St. 1869, c. 367, s. 3.

*Sect. 5.* Repealed and superseded by St. 1868, c. 276. See also St. 1869, c. 367, s. 1.

*Sect. 6.* Provision for adding interest to each third of assessment, until paid. St. 1869, c. 367, s. 2.

CHAPTER 189. *Sect. 2.* Repealed by St. 1869, c. 128.

CHAPTER 196. Obsolete, see St. 1869, c. 110.

CHAPTER 198. Additional act. St. 1869, c. 258.

CHAPTER 208. *Sect. 1.* This section repealed and superseded by St. 1869, c. 168.

CHAPTER 219. Additional and amendatory acts. St. 1867, c. 266. — St. 1867, c. 309. — St. 1868, c. 284. — St. 1869, c. 205. — St. 1869, c. 332.

“ Act to authorize the organization of an independent company of cavalry.” St. 1866, c. 226.

State guard of Worcester not affected by this chapter. St. 1867, c. 100.

*Sect. 27.* This section “ so far amended that the non-commissioned officers, musicians, and privates of cadet companies may consist of such number as the commander-in-chief may direct. St. 1866, c. 259.

*Sect. 62.* Salary of adjutant-general fixed at \$2,500. St. 1866, c. 298, s. 3.

CHAPTER 220. As to the purpose of this statute, see *Bryan v. Bates*, 12 Allen 201, 206.

CHAPTER 222. As to the law prior to this statute, see *Drury v. Natick*, 10 Allen 169, 183.

CHAPTER 235. *Sect. 1.* This section does not repeal Gen. St. c. 165, s. 28. *Commonwealth v. Norton*, 13 Allen 550.

CHAPTER 238. Additional act. St. 1867, c. 344.

*Sect. 1.* The commissioners referred to in this section to be styled "commissioners on inland fisheries," and to consist of three persons, &c., &c. St. 1869, c. 384, s. 1.

*Sect. 2.* Additional powers and duties of commissioners. St. 1867, c. 344. — St. 1868, c. 179, s. 2. — St. 1869, c. 384, ss. 3-6, 9, 10.

*Sect. 7.* Instead of proceeding as provided in this section, the commissioners may apply to the supreme court in equity to enforce the construction of fish-ways. St. 1869, c. 422.

CHAPTER 249. Repealed by St. 1869, c. 384, s. 34.

CHAPTER 253. *Sect. 1.* As to the form of indictment under this section, see *Commonwealth v. Raymond*, 97 Mass. 567.

CHAPTER 255. *Sect. 2.* Salary of clerk of insurance commissioners raised to \$1,500. St. 1867, c. 167, s. 3.

CHAPTER 260. If a defendant offers himself as a witness under this chapter, he may be interrogated as a general witness in the case, and he subjects himself to the general liabilities incident to the position. *Commonwealth v. Mullen*, 97 Mass. 445, 456. — *Commonwealth v. Bonner*, 97 Mass. 587, 589.

CHAPTER 261. *Sect. 5.* See *Commonwealth v. Conolly*, 97 Mass. 591.

CHAPTER 262. Repealed and superseded by St. 1867, c. 286.

CHAPTER 264. *Sect. 2.* For a case arising under the provisions of this section, see *Linzee v. Mixer*, decided in July, 1869. (Suffolk county.)

CHAPTER 273. Repealed by St. 1867, c. 285, s. 5.

CHAPTER 279. See St. 1867, c. 355.

*Sect. 1.* Municipal court of the city of Boston to have original concurrent jurisdiction with the municipal court for the southern district of Boston, in all cases where the last named court previously had exclusive jurisdiction. St. 1869, c. 17, s. 2.

*"To be called the municipal court of the city of Boston."*  
See *Commonwealth v. Certain Intoxicating Liquors*, 97 Mass. 601, 603.

*Sect. 6.* Provision for appointment of assistant clerk for civil business. St. 1867, c. 355, s. 6.

Salaries of clerks altered by St. 1867, c. 356.

*Sect. 9.* See St. 1862, c. 217, s. 4, as to removal of actions to the superior court.

*"The same jurisdiction as the said police court now has," &c.*  
As to what that jurisdiction was, see *Aspinwall v. Cushman*, 11 Allen 405.

*"And all writs and processes may run into and be served in any county, provided," &c.* For further provisions on this subject, see St. 1867, c. 355, ss. 3-5.

*Sect. 11.* This section so amended that the court "shall be held for criminal business in the afternoon, only when it appears expedient to any of the justices thereof." St. 1869, c. 17, s. 1.

CHAPTER 280. As to the effect of this act in repealing Gen. St. c. 87, ss. 6, 7, and Gen. St. c. 86, s. 31, see *Commonwealth v. McDonough*, 13 Allen 581, 582.—*Dolan v. Thomas*, 12 Allen 421.—*Flaherty v. Thomas*, 12 Allen 428.—*Carter v. Burt*, 12 Allen 424.

CHAPTER 282. Repealed by St. 1867, c. 136, s. 9.

CHAPTER 283. *Sect. 1.* This section "so amended that the approval therein required to be made by the supreme judicial court, or any two justices thereof, shall be made by the superior court, or, in vacation, by a justice thereof." St. 1867, c. 2.

*Sect. 5.* Repealed by St. 1867, c. 156.



CHAPTER 285. Additional acts. St. 1867, c. 286. — St. 1869, c. 152.

CHAPTER 290. Shareholders in co-operative associations may hold shares to the amount of \$20, which shall be exempt from being taken on attachment or execution. St. 1867, c. 264.

CHAPTER 298. Additional act. St. 1867, c. 167.

---

## STATUTES OF 1867.

CHAPTER 36. Prior to this statute a stockholder in a corporation had no authority to appear and defend an action against it. *Byers v. Franklin Coal Co.*, 14 Allen 470. — *Johnson v. Somerville Dyeing and Bleaching Co.*, 15 Gray 216, 218.

CHAPTER 50. Superseded by St. 1869, c. 62.

CHAPTER 67. As to the law prior to this statute, see *Lincoln v. Taunton Manufacturing Co.*, 13 Allen 276.

CHAPTER 125. Repealed and superseded by St. 1869, c. 246.

CHAPTER 130. *Sect. 2.* For the reason for this section, see *Commonwealth v. Brimblecom*, 4 Allen 584.

*Sect. 7.* “*Shall kill, or cause to be killed, all such dogs whenever and wherever found.*” This does not authorize one to enter, without the owner’s leave, into a dwelling-house for the purpose of killing an unlicensed dog. *Kerr v. Seaver*, 11 Allen 151. — *Bishop v. Fahay*, 15 Gray 61.

*Sect. 10.* “*Other domestic animals.*” These include *horses*. *Osborn v. Lenox*, 2 Allen 207, 209.

*Sect. 12.* Last paragraph repealed and superseded by St. 1869, c. 250.

CHAPTER 136. See St. 1868, c. 107.

*Sect. 3.* Repealed by St. 1868, c. 115.

CHAPTER 149. Amended by St. 1868, c. 128.

CHAPTER 154. Obsolete, see St. 1869, c. 110.

CHAPTER 165. Salaries, as established by this chapter, to be paid from 1 January, 1867. Resolves 1867, c. 89.

CHAPTER 167. *Sects.* 1, 2. Salaries of clerks of senate and house of representatives, and of the sergeant-at-arms, raised to \$2,500. St. 1867, c. 305.

*Sect.* 3. Salary of the clerk of the insurance commissioner raised to \$2,000. St. 1869, c. 434, s. 1.

*Sect.* 6. Salary of chief clerk of the treasury department raised to \$2,500. St. 1869, c. 454.

CHAPTER 178. *Sect.* 3. As to the law prior to this statute, see Opinion of Justices, 13 Allen 593.

CHAPTER 222. *Sect.* 2. For a rule of court giving the form of notice, &c., under this section, see 98 Mass. 408.

CHAPTER 254. Repealed by St. 1868, c. 70.

CHAPTER 257. Repealed by St. 1869, c. 246, s. 10.

CHAPTER 267. *Sect.* 1. See St. 1868, c. 317, s. 1.

*Sect.* 8. See St. 1869, c. 434, s. 2.

CHAPTER 275. Prior to this statute the provisions of Gen. St. c. 154, s. 12, applied to the rights of the commonwealth below high-water mark. *Nichols v. Boston*, 98 Mass. 39.

CHAPTER 286. Additional act. St. 1869, c. 152.

CHAPTER 298. See *Durfee v. Old Col. & Fall River R.R.*, 5 Allen 280, 248.

CHAPTER 307. Superseded by St. 1868, c. 196.

CHAPTER 314. Repealed by St. 1868, c. 293, s. 3.

CHAPTER 349. *Sect.* 1. Salaries of district attorneys and of assistant district attorneys to be payable monthly on the first day of each month. St. 1868, c. 4.

CHAPTER 354. Additional act. St. 1868, c. 326.

*Sects.* 3, 5. Repealed by St. 1868, c. 326, s. 9.

CHAPTER 355. *Sect.* 6. Salary of assistant clerk to be paid by the county of Suffolk. St. 1868, c. 159.

CHAPTER 359. This act was duly accepted in the manner therein provided.

## STATUTES OF 1868.

CHAPTER 126. Repealed by St. 1869, c. 246.

CHAPTER 130. Repealed by St. 1869, c. 76, s. 5.

CHAPTER 132. The following would seem to be a proper form for the affidavit referred to in this chapter.

I, A. B., being a devisee and "successor" of the above-named C. D., on oath say that the above is the genuine receipt of the United States collector of internal revenue therein named, and that it is in full for the United States succession tax or duty upon all the real estate of the said deceased.

CHAPTER 141. Repealed by St. 1869, c. 415, s. 65. Previously amended by St. 1868, c. 311.—St. 1868, c. 318.—St. 1868, c. 342.—St. 1868, c. 344.—St. 1869, c. 191.

CHAPTER 158. Repealed and superseded by St. 1869, c. 246.

CHAPTER 161. Repealed and superseded by St. 1869, c. 246.

CHAPTER 165. *Sect. 1.* See St. 1868, c. 283.

CHAPTER 179. Repealed by St. 1869, c. 384, s. 84. Previously amended by St. 1869, c. 64.—St. 1869, c. 75.

CHAPTER 211. *Sect. 1.* Repealed by St. 1869, c. 443.

*Sect. 2.* Amended by St. 1869, c. 443.

CHAPTER 212. Repealed by St. 1869, c. 344.

CHAPTER 263. Repealed by St. 1869, c. 150, s. 4.

CHAPTER 265. As to the law prior to this statute, see *Cabot Bank v. Warner*, 10 Allen 522, 524.

CHAPTER 276. Made applicable to all cities in the commonwealth, provided, &c. St. 1869, c. 169, s. 5.

*Sect. 1.* Assessment to be laid within two years after the passage of the order for laying out, &c. St. 1869, c. 367, s. 1.

CHAPTER 278. Repealed by St. 1869, c. 423, s. 1. See also St. 1869, c. 110.

CHAPTER 285. Repealed and superseded by St. 1869, c. 436.

CHAPTER 287. *Sect. 1.* "The supreme judicial court may,"

*f.c.* Concurrent jurisdiction given to probate courts. St. 1869, c. 331.

CHAPTER 292. *Sect.* 2. Amended by St. 1869, c. 7.

CHAPTER 293. *Sect.* 2. Amended by St. 1869, c. 7.

CHAPTER 311. Repealed by St. 1869, c. 415, s. 65.

CHAPTER 318. Repealed by St. 1869, c. 415, s. 65. (Previously amended by St. 1868, c. 344.)

CHAPTER 325. Amended by St. 1868, c. 351.—St. 1869, c. 1.

*Sect.* 2. Repealed by St. 1869, c. 60, s. 2.

CHAPTER 329. Repealed by St. 1869, c. 60, s. 2.

CHAPTER 342. Repealed by St. 1869, c. 415, s. 65.

CHAPTER 344. Repealed by St. 1869, c. 415, s. 65.

CHAPTER 346. Repealed, saving proceedings already commenced. St. 1869, c. 417.

---

## STATUTES OF 1869.

CHAPTER 64. Obsolete. St. 1868, c. 179, to which this statute refers, having been repealed by St. 1869, c. 384, s. 34.

CHAPTER 75. Obsolete. St. 1868, c. 179, to which this statute refers, having been repealed by St. 1869, c. 384, s. 34.

CHAPTER 91. *Sect.* 1. The interest referred to in this section, to be payable on first days of January and July, instead of March and November. St. 1869, c. 293.

CHAPTER 110. Additional act. St. 1869, c. 423.

*Sect.* 2. Amended by St. 1869, c. 423, ss. 5, 7.

CHAPTER 152. *Sect.* 11. Repealed and superseded by St. 1869, c. 345.

CHAPTER 191. Obsolete; the law to which it refers having been repealed by St. 1869, c. 415, s. 65.

CHAPTER 303. As to the purpose and effect of this statute, see *Pickford v. Lynn*, 98 Mass. 491, 498.

CHAPTER 344. For a case under an earlier statute relative to cruelty to animals, see *Commonwealth v. Lufkin*, 7 Allen 579.

CHAPTER 349. This act has been duly accepted in accordance with the provisions of the tenth section.

CHAPTER 368. Prior to this statute a lessee, whose tenancy was determined before the day on which the rent was due, was not liable for any portion of the rent due on that day, nor was he liable even for use and occupation for the time of his occupation subsequent to the next preceding rent-day. *Nicholson v. Munigle*, 6 Allen 215. — *Earle v. Kingsbury*, 3 Cush. 206. — *Leishman v. White*, 1 Allen 489.

CHAPTER 415. The word "constable," wherever occurring in this chapter, to be construed to include the constable of the commonwealth and his deputies. St. 1869, c. 442.

A license granted under United States St. 1862, c. 119, does not authorize a sale of intoxicating liquors in this state contrary to the provisions of this act. *Commonwealth v. O'Donnell*, 8 Allen 548. — *Commonwealth v. Thorniley*, 6 Allen 445.

*Commissioner.*

*Sect. 3.* "*Shall be made for cash.*" That is, cash at or before the delivery of the liquor, — if any credit, however short, be given, the commissioner cannot recover against the town, although it has received the value of the liquor so sold. *Mansfield v. Stoneham*, 15 Gray 149.

*City and Town Agents.*

Agents are not liable in damages to any person for refusing, under any circumstances, to sell intoxicating liquor. *Dwinnels v. Parsons*, 98 Mass. 470.

*Sect. 17.* Liquors purchased by a town agent, in pursuance of his appointment, belong to the town. *Washington v. Eames*, 6 Allen 417.

*"And if in any year they neglect for three months to appoint."*

For cases in which the question was whether the selectmen had been guilty of such neglect, see *Sears v. Tyler*, 10 Allen 469. — *Rowe v. Edmands*, 3 Allen 334.

*"Not dependent in amount upon the sales."* When an agent's salary, in violation of this provision, was made dependent in amount upon his sales, it was held that no action could be maintained against him by the town for a failure to account for the proceeds of the business. *Washington v. Eames*, 8 Allen 432.

*Sect. 18.* The giving of the bond and the receiving of the certificate referred to in this section "are intended to be conditions precedent, to be complied with by the agent before his authority to act becomes perfect." *Commonwealth v. Pillsbury*, 12 Gray 127, 130.

As to what will amount to a breach of the bond required by this section, see *Wenham v. Dodge*, 98 Mass. 474, 481, &c.

*Sect. 20.* *"Each agent shall keep an account of all purchases of liquors made by him and shall specify," &c.* Bills of parcels of liquors bought by the agent, containing in substance the particulars required by this section, are a sufficient account within the meaning of this section. *Wenham v. Dodge*, 98 Mass. 474, 477.

*"He shall keep a book and enter therein the date of every sale," &c.* As to what is a sufficient compliance with this provision, see *Wenham v. Dodge*, 98 Mass. 474, 478.

*"Substantially in the following form."* It is not necessary that the book should be kept in the tabular form given in the statute. *Wenham v. Dodge*, 98 Mass. 474, 482.

*Sales, &c., Specially Authorized.*

*Sect. 27. "The importer."* As to who is to be deemed such, see *King v. McAvoy*, 4 Allen 110, 111.

*Sect. 28.* Upon an indictment for being a common seller of intoxicating liquors, the government is not required to prove

affirmatively that the sales made by the defendant were not authorized by this section. *Commonwealth v. Livermore*, 4 Allen 434.

*Unlawful Sales, &c., — Remedies, Punishments, &c.*

*"No person shall \* \* \* sell."* This prohibition refers not only to sales for money, but also to cases in which intoxicating liquors are bartered or exchanged for other articles. *Howard v. Harris*, 8 Allen 297. See also note to section 30.

One effect of the provisions of this section, forbidding sales of intoxicating liquors, is to render them not liable to be taken on execution. *Ingalls v. Baker*, 13 Allen 449.

*"Shall be considered intoxicating liquors."* As to the effect of this provision, see *Commonwealth v. Anthes*, 12 Gray 29. — *Commonwealth v. Dean*, 14 Gray 99. — *Commonwealth v. Timothy*, 8 Gray 480.

*Sect. 32. "Whoever \* \* \* sells."* A sale on credit is a sale within the meaning of this section. *Commonwealth v. Burns*, 8 Gray 482. So, also, an exchange of intoxicating liquor for grain. *Commonwealth v. Clark*, 14 Gray 367, 372. See also note to section 28.

*Sect. 33. "Three several sales \* \* \* shall be sufficient evidence," &c.* Evidence of at least three sales is necessary to prove the offence of being a common seller under this section. *Commonwealth v. Clark*, 14 Gray 367, 374. — *Commonwealth v. Munn*, 14 Gray 361, 364.

Under this section a jury is not only authorized, but *required*, upon proof of three sales, to convict the defendant of being a common seller. *Commonwealth v. Barker*, 14 Gray 412.

As to what is sufficient evidence of "three several sales," see *Commonwealth v. Graves*, 97 Mass. 114. — *Commonwealth v. Hogan*, 97 Mass. 120. — *Commonwealth v. Mahoney*, 14 Gray 46. — *Commonwealth v. Dady*, 7 Allen 531.

*Sect. 34. "Whoever is convicted of more than one offence on the same complaint or indictment," &c.* See *Commonwealth v. Cain*, 14 Gray 9.

*Sect. 35.* As to the constitutionality of this section, see *Commonwealth v. Rowe*, 14 Gray 47.

For other cases arising under this section, see *Commonwealth v. Leighton*, 7 Allen 528. — *Commonwealth v. Pillsbury*, 12 Gray 127.

*Sect. 36.* A knowledge of the intoxicating qualities of the liquors owned, &c., is not necessary in order to constitute an offence under this section. *Commonwealth v. Goodman*, 97 Mass. 117.

For other cases arising under this section, see *Commonwealth v. Gilland*, 9 Gray 3. — *Commonwealth v. McConnell*, 11 Gray 204.

*Sect. 39.* “*Conveys from place to place.*” This applies, although such places are both in the same town. *Commonwealth v. Waters*, 11 Gray 81.

As to the manner in which the places should be alleged in the complaint, see *Commonwealth v. Reily*, 9 Gray 1.

“*Having reasonable cause to believe that the same is intended to be sold,*” &c. As to what is proper evidence to show such reasonable cause, see *Commonwealth v. Commeskey*, 97 Mass. 585.

A complaint under this section need not allege that the liquors transported were not in the original packages in which they were imported. *Commonwealth v. Waters*, 11 Gray 81.

*Sect. 43.* “*And the person so disclosing shall be named as one of the witnesses.*” This “is directory only, and is designed to guide officers and magistrates in the performance of the duties imposed on them under” this section. “But it is not intended to change the form of complaints or indictments, or to require any new or special allegations against the person charged with the offence of selling liquor contrary to law.” *Commonwealth v. Davis*, 11 Gray 457.

*Sect. 44.* As to the proper form of a complaint under this section, see *Commonwealth v. Certain Intoxicating Liquors*, 6 Allen 596. — *Commonwealth v. Edwards*, 12 Cush. 187.

As to the proper form of a search warrant under this section,



see *Downing v. Porter*, 8 Gray 539. — *Commonwealth v. Certain Intoxicating Liquors*, 6 Allen 596.

*Sect. 45.* As to the proper form of complaint and warrant under this section, see *Commonwealth v. Certain Intoxicating Liquors*, 13 Allen 52. — *Commonwealth v. Certain Intoxicating Liquors*, 6 Allen 599. — *Commonwealth v. Certain Intoxicating Liquors*, 97 Mass. 332.

*Sect. 46.* “*The complaint shall particularly designate so as to identify,*” &c. See *Commonwealth v. Certain Intoxicating Liquors*, 97 Mass. 334.

*Sect. 48.* “*If in the opinion of the justice,*” &c. Such opinion sufficiently appears of record, if it is stated in the notice to the keeper and claimants, which is required by the provisions of this chapter. *Commonwealth v. Certain Intoxicating Liquors*, 13 Allen 561.

“*Within twenty-four hours after such seizure.*” Sunday not to be included in reckoning the time here limited. *Commonwealth v. Certain Intoxicating Liquors*, 97 Mass. 601, 602.

*Sect. 49.* As to what is a sufficient notice under this section, see *Commonwealth v. Certain Intoxicating Liquors*, 6 Allen 599. — *Commonwealth v. Certain Intoxicating Liquors*, 97 Mass. 334.

*Sect. 56.* “*Shall be returnable to the term of the superior court.*” That is, the term for criminal business, if there are separate terms for civil and criminal business. *Commonwealth v. Certain Intoxicating Liquors*, 13 Allen 561.

*Sect. 57.* For cases relative to arrests without warrants under this section, see *Kennedy v. Favor*, 14 Gray 200. — *Kent v. Willy*, 11 Gray 368.

*Sect. 60.* A continuance of an indictment under this chapter will be effectual, although no written motion or statement be filed as required by this section. *Commonwealth v. Dorner*, 11 Gray 318.

*Sect. 62.* As to the effect of this provision, see *Brown v. Perkins*, 12 Gray 89.

*Sect. 63.* In an action to recover the price of intoxicating liquors, the burden of proof is on the defendant to show that they were unlawfully sold. *Wilson v. Melvin*, 13 Gray 73.

*"No action of any kind shall be had or maintained in any court for the price of any liquor sold in any other state for the purpose of being brought into this commonwealth," &c.* See *Savage v. Mallory*, 4 Allen 492. — *Bligh v. James*, 6 Allen 570. — *Kellogg v. Moore*, 2 Allen 266. — *Verry v. Richardson*, 5 Allen 106. — *Webster v. Munger*, 8 Gray 584. — *Crary v. Pollard*, 14 Allen 284, 288.

*"And all bills of exchange, promissory notes, and other securities for, and evidences of, debt whatsoever, given, &c., shall be void," &c.* As to the law on this subject prior to the enactment of this provision, see *Cazet v. Field*, 9 Gray 329.

No action can be maintained against a surety upon such a note, although he has received from the maker of the note a full indemnity for signing it. *Nourse v. Pope*, 13 Allen 87.

*Sect. 64.* An officer seizing, under a search warrant duly issued, liquors *not described in his warrant*, will be liable to an action by the owner thereof, notwithstanding this section. *Arthur v. Flanders*, 10 Gray 107.

So also of an officer who, *without a warrant*, enters a building and seizes intoxicating liquors illegally kept by the owner thereof. *Reed v. Adams*, 2 Allen 413.

So, also, where the proceedings upon the warrant are subsequently abated, and the officer refuses to deliver the liquors up to the owner upon demand. *Ewings v. Walker*, 9 Gray 95.

CHAPTER 418. As to the mode of setting out dower to the widow of a tenant in common, see *Blossom v. Blossom*, 9 Allen 254.

CHAPTER 445. *Sect. 7.* The word "June" at the end of this section struck out, and the words "July next" inserted in its place. St. 1869, c. 455.



**A LIST**  
**OF**  
**CITIES AND TOWNS IN THE STATE,**  
**AND OF**  
**CERTAIN STATE AND COUNTY OFFICERS.**



# A LIST OF CITIES AND TOWNS IN THE STATE, AND OF CERTAIN STATE AND COUNTY OFFICERS.

*Cities and Towns in Massachusetts, with the Counties in which they are located.*

A.			
Abington . . . . .	Plymouth.	Billerica . . . . .	Middlesex.
Acton . . . . .	Middlesex.	Blackstone . . . . .	Worcester.
Acushnet . . . . .	Bristol.	Blandford . . . . .	Hampden.
Adams . . . . .	Berkshire.	Bolton . . . . .	Worcester.
Agawam . . . . .	Hampden.	Boston (City) . . . . .	Suffolk.
Alford . . . . .	Berkshire.	Boxborough . . . . .	Middlesex.
Amesbury . . . . .	Essex.	Boxford . . . . .	Essex.
Amherst . . . . .	Hampshire.	Boylston . . . . .	Worcester.
Andover . . . . .	Essex.	Bradford . . . . .	Essex.
Arlington . . . . .	Middlesex.	Braintree . . . . .	Norfolk.
Ashburnham . . . . .	Worcester.	Brewster . . . . .	Barnstable.
Ashby . . . . .	Middlesex.	Bridgewater . . . . .	Plymouth.
Ashfield . . . . .	Franklin.	Brighton . . . . .	Middlesex.
Ashland . . . . .	Middlesex.	Brimfield . . . . .	Hampden.
Athol . . . . .	Worcester.	Brookfield . . . . .	Worcester.
Attleborough . . . . .	Bristol.	Brookline . . . . .	Norfolk.
Auburn . . . . .	Worcester.	Buckland . . . . .	Franklin.
		Burlington . . . . .	Middlesex.
B.		C.	
Barnstable . . . . .	Barnstable.	Cambridge (City) . . . . .	Middlesex.
Barre . . . . .	Worcester.	Canton . . . . .	Norfolk.
Becket . . . . .	Berkshire.	Carlisle . . . . .	Middlesex.
Bedford . . . . .	Middlesex.	Carver . . . . .	Plymouth.
Belchertown . . . . .	Hampshire.	Charlemont (City) . . . . .	Franklin.
Bellingham . . . . .	Norfolk.	Charlestown . . . . .	Middlesex.
Belmont . . . . .	Middlesex.	Charlton . . . . .	Worcester.
Berkley . . . . .	Bristol.	Chatham . . . . .	Barnstable.
Berlin . . . . .	Worcester.	Chelmsford . . . . .	Middlesex.
Bernardston . . . . .	Franklin.	Chelsea (City) . . . . .	Suffolk.
Beverly . . . . .	Essex.	Cheshire . . . . .	Berkshire.

# 582 LIST OF CITIES AND TOWNS IN MASSACHUSETTS.

Chester . . . . . Hampden.  
 Chesterfield . . . . . Hampshire.  
 Chicopee . . . . . Hampden.  
 Chilmark . . . . . Dukes.  
 Clarksburg . . . . . Berkshire.  
 Clinton . . . . . Worcester.  
 Cohasset . . . . . Norfolk.  
 Colrain . . . . . Franklin.  
 Concord . . . . . Middlesex.  
 Conway . . . . . Franklin.  
 Cummington . . . . . Hampshire.

## D.

Dalton . . . . . Berkshire.  
 Dana . . . . . Worcester.  
 Danvers . . . . . Essex.  
 Dartmouth . . . . . Bristol.  
 Dedham . . . . . Norfolk.  
 Deerfield . . . . . Franklin.  
 Dennis . . . . . Barnstable.  
 Dighton . . . . . Bristol.  
 Dorchester . . . . . Norfolk.  
 Douglas . . . . . Worcester.  
 Dover . . . . . Norfolk.  
 Dracut . . . . . Middlesex.  
 Dudley . . . . . Worcester.  
 Dunstable . . . . . Middlesex.  
 Duxbury . . . . . Plymouth.

## E.

East Bridgewater . . . . . Plymouth.  
 Eastham . . . . . Barnstable.  
 Easthampton . . . . . Hampshire.  
 Easton . . . . . Bristol.  
 Edgartown . . . . . Dukes.  
 Egremont . . . . . Berkshire.  
 Enfield . . . . . Hampshire.  
 Erving . . . . . Franklin.  
 Essex . . . . . Essex.

## F.

Fairhaven . . . . . Bristol.  
 Fall River (*City*) . . . . . Bristol.  
 Falmouth . . . . . Barnstable.  
 Fitchburg . . . . . Worcester.  
 Florida . . . . . Berkshire.  
 Foxborough . . . . . Norfolk.  
 Framingham . . . . . Middlesex.

Franklin . . . . . Norfolk.  
 Freetown . . . . . Bristol.

## G.

Gardner . . . . . Worcester.  
 Georgetown . . . . . Essex.  
 Gill . . . . . Franklin.  
 Gloucester . . . . . Essex.  
 Goshen . . . . . Hampshire.  
 Gosnold . . . . . Dukes.  
 Grafton . . . . . Worcester.  
 Granby . . . . . Hampshire.  
 Granville . . . . . Hampden.  
 Great Barrington . . . . . Berkshire.  
 Greenfield . . . . . Franklin.  
 Greenwich . . . . . Hampshire.  
 Groton . . . . . Middlesex.  
 Groveland . . . . . Essex.

## H.

Hadley . . . . . Hampshire.  
 Halifax . . . . . Plymouth.  
 Hamilton . . . . . Essex.  
 Hancock . . . . . Berkshire.  
 Hanover . . . . . Plymouth.  
 Hanson . . . . . Plymouth.  
 Hardwick . . . . . Worcester.  
 Harvard . . . . . Worcester.  
 Harwich . . . . . Barnstable.  
 Hatfield . . . . . Hampshire.  
 Haverhill (*City*) . . . . . Essex.  
 Hawley . . . . . Franklin.  
 Heath . . . . . Franklin.  
 Hingham . . . . . Plymouth.  
 Hinsdale . . . . . Berkshire.  
 Holden . . . . . Worcester.  
 Holland . . . . . Hampden.  
 Holliston . . . . . Middlesex.  
 Holyoke . . . . . Hampden.  
 Hopkinton . . . . . Middlesex.  
 Hubbardston . . . . . Worcester.  
 Hudson . . . . . Middlesex.  
 Hull . . . . . Plymouth.  
 Huntington . . . . . Hampshire.  
 Hyde Park . . . . . Norfolk.

## I.

Ipswich . . . . . Essex.

# LIST OF CITIES AND TOWNS IN MASSACHUSETTS. 583

**K.**  
Kingston . . . . . Plymouth.

**L.**  
Lakeville . . . . . Plymouth.  
Lancaster . . . . . Worcester.  
Lanesborough . . . . . Berkshire.  
Lawrence (*City*) . . . . . Essex.  
Lee . . . . . Berkshire.  
Leicester . . . . . Worcester.  
Lenox . . . . . Berkshire.  
Leominster . . . . . Worcester.  
Leverett . . . . . Franklin.  
Lexington . . . . . Middlesex.  
Leyden . . . . . Franklin.  
Lincoln . . . . . Middlesex.  
Littleton . . . . . Middlesex.  
Longmeadow . . . . . Hampden.  
Lowell (*City*) . . . . . Middlesex.  
Ludlow . . . . . Hampden.  
Lunenburg . . . . . Worcester.  
Lynn (*City*) . . . . . Essex.  
Lynnfield . . . . . Essex.

**M.**  
Malden . . . . . Middlesex.  
Manchester . . . . . Essex.  
Mansfield . . . . . Bristol.  
Marblehead . . . . . Essex.  
Marion . . . . . Plymouth.  
Marlborough . . . . . Middlesex.  
Marshfield . . . . . Plymouth.  
Mattapoisett . . . . . Plymouth.  
Medfield . . . . . Norfolk.  
Medford . . . . . Middlesex.  
Medway . . . . . Norfolk.  
Melrose . . . . . Middlesex.  
Mendon . . . . . Worcester.  
Methuen . . . . . Essex.  
Middleborough . . . . . Plymouth.  
Middlefield . . . . . Hampshire.  
Middleton . . . . . Essex.  
Milford . . . . . Worcester.  
Millbury . . . . . Worcester.  
Milton . . . . . Norfolk.  
Monroe . . . . . Franklin.  
Monson . . . . . Hampden.  
Montague . . . . . Franklin.

Monterey . . . . . Berkshire.  
Montgomery . . . . . Hampden.  
Mount Washington . . . . . Berkshire.

**N.**  
Nahant . . . . . Essex.  
Nantucket . . . . . Nantucket.  
Natick . . . . . Middlesex.  
Needham . . . . . Norfolk.  
New Ashford . . . . . Berkshire.  
New Bedford (*City*) . . . . . Bristol.  
New Braintree . . . . . Worcester.  
New Marlborough . . . . . Berkshire.  
New Salem . . . . . Franklin.  
Newbury . . . . . Essex.  
Newburyport (*City*) . . . . . Essex.  
Newton . . . . . Middlesex.  
North Andover . . . . . Essex.  
North Bridgewater . . . . . Plymouth.  
North Brookfield . . . . . Worcester.  
North Chelsea . . . . . Suffolk.  
North Reading . . . . . Middlesex.  
Northampton . . . . . Hampshire.  
Northborough . . . . . Worcester.  
Northbridge . . . . . Worcester.  
Northfield . . . . . Franklin.  
Norton . . . . . Bristol.

**O.**  
Oakham . . . . . Worcester.  
Orange . . . . . Franklin.  
Orleans . . . . . Barnstable.  
Otis . . . . . Berkshire.  
Oxford . . . . . Worcester.

**P.**  
Palmer . . . . . Hampden.  
Paxton . . . . . Worcester.  
Peabody . . . . . Essex.  
Pelham . . . . . Hampshire.  
Pembroke . . . . . Plymouth.  
Pepperell . . . . . Middlesex.  
Pern . . . . . Berkshire.  
Petersham . . . . . Worcester.  
Phillipston . . . . . Worcester.  
Pittsfield . . . . . Berkshire.  
Plainfield . . . . . Hampshire.  
Plymouth . . . . . Plymouth.  
Plympton . . . . . Plymouth.



# 584 LIST OF CITIES AND TOWNS IN MASSACHUSETTS.

Prescott . . . . . Hampshire.  
 Princeton . . . . . Worcester.  
 Provincetown . . . . . Barnstable.

## Q.

Quincy . . . . . Norfolk.

## R.

Randolph . . . . . Norfolk.  
 Raynham . . . . . Bristol.  
 Reading . . . . . Middlesex.  
 Rehoboth . . . . . Bristol.  
 Richmond . . . . . Berkshire.  
 Rochester . . . . . Plymouth.  
 Rockport . . . . . Essex.  
 Rowe . . . . . Franklin.  
 Rowley . . . . . Essex.  
 Roxbury (*City*) . . . . . Norfolk.  
 Royalston . . . . . Worcester.  
 Russell . . . . . Hampden.  
 Rutland . . . . . Worcester.

## S.

Salem (*City*) . . . . . Essex.  
 Salisbury . . . . . Essex.  
 Sandisfield . . . . . Berkshire.  
 Sandwich . . . . . Barnstable.  
 Saugus . . . . . Essex.  
 Savoy . . . . . Berkshire.  
 Scituate . . . . . Plymouth.  
 Seekonk . . . . . Bristol.  
 Sharon . . . . . Norfolk.  
 Sheffield . . . . . Berkshire.  
 Shelburne . . . . . Franklin.  
 Sherborn . . . . . Middlesex.  
 Shirley . . . . . Middlesex.  
 Shrewsbury . . . . . Worcester.  
 Shutesbury . . . . . Franklin.  
 Somerset . . . . . Bristol.  
 Somerville . . . . . Middlesex.  
 South Hadley . . . . . Hampshire.  
 South Scituate . . . . . Plymouth.  
 Southampton . . . . . Hampshire.  
 Southborough . . . . . Worcester.  
 Southbridge . . . . . Worcester.  
 Southwick . . . . . Hampden.  
 Spencer . . . . . Worcester.  
 Springfield (*City*) . . . . . Hampden.  
 Sterling . . . . . Worcester.

Stockbridge . . . . . Berkshire.  
 Stoneham . . . . . Middlesex.  
 Stoughton . . . . . Norfolk.  
 Stow . . . . . Middlesex.  
 Sturbridge . . . . . Worcester.  
 Sudbury . . . . . Middlesex.  
 Sunderland . . . . . Franklin.  
 Sutton . . . . . Worcester.  
 Swampscott . . . . . Essex.  
 Swanzev . . . . . Bristol.

## T.

Taunton (*City*) . . . . . Bristol.  
 Templeton . . . . . Worcester.  
 Tewksbury . . . . . Middlesex.  
 Tisbury . . . . . Dukes.  
 Tolland . . . . . Hampden.  
 Topsfield . . . . . Essex.  
 Townsend . . . . . Middlesex.  
 Truro . . . . . Barnstable.  
 Tyngsborough . . . . . Middlesex.  
 Tyringham . . . . . Berkshire.

## U.

Upton . . . . . Worcester.  
 Uxbridge . . . . . Worcester.

## W.

Wakefield . . . . . Middlesex.  
 Wales . . . . . Hampden.  
 Walpole . . . . . Norfolk.  
 Waltham . . . . . Middlesex.  
 Ware . . . . . Hampshire.  
 Wareham . . . . . Plymouth.  
 Warren . . . . . Worcester.  
 Warwick . . . . . Franklin.  
 Washington . . . . . Berkshire.  
 Watertown . . . . . Middlesex.  
 Wayland . . . . . Middlesex.  
 Webster . . . . . Worcester.  
 Wellfleet . . . . . Barnstable.  
 Wendell . . . . . Franklin.  
 Wenham . . . . . Essex.  
 West Boylston . . . . . Worcester.  
 West Bridgewater . . . . . Plymouth.  
 West Brookfield . . . . . Worcester.  
 West Newbury . . . . . Essex.  
 West Roxbury . . . . . Norfolk.  
 West Springfield . . . . . Hampden.

West Stockbridge . . . . .	Berkshire.	Wilmington . . . . .	Middlesex.
Westborough . . . . .	Worcester.	Winchendon . . . . .	Worcester.
Westfield . . . . .	Hampden.	Winchester . . . . .	Middlesex.
Westford . . . . .	Middlesex.	Windsor . . . . .	Berkshire.
Westhampton . . . . .	Hampshire.	Winthrop . . . . .	Suffolk.
Westminster . . . . .	Worcester.	Woburn . . . . .	Middlesex.
Weston . . . . .	Middlesex.	Worcester (City) . . . . .	Worcester.
Westport . . . . .	Bristol.	Worthington . . . . .	Hampshire.
Weymouth . . . . .	Norfolk.	Wrentham . . . . .	Norfolk.
Whately . . . . .	Franklin.		
Wilbraham . . . . .	Hampden.		
Williamsburg . . . . .	Hampshire.		
Williamstown . . . . .	Berkshire.		

Y.

Yarmouth . . . . . Barnstable.

*List of State and County Officers.*

## JUSTICES OF SUPREME JUDICIAL COURT.

Reuben A. Chapman . . . . .	Springfield . . . . .	Chief Justice . . . . .	When appointed. Feb. 7, 1868.
Horace Gray, Jr. . . . .	Boston . . . . .	Associate Justice . . . . .	Aug. 23, 1864.
John Wells . . . . .	Chicopee . . . . .	" "	Sept. 22, 1866.
James D. Colt . . . . .	Pittsfield . . . . .	" "	Feb. 14, 1868.
Seth Ames . . . . .	Boston . . . . .	" "	Jan. 19, 1869.
Marcus Morton . . . . .	Andover . . . . .	" "	April 18, 1869.

## REPORTER OF DECISIONS OF SUPREME JUDICIAL COURT.

(Gen. St. c. 121, s. 51.)

Albert G. Browne, Jr. . . . .	Boston . . . . .	Aug. 22, 1867.
-------------------------------	------------------	----------------

## JUSTICES OF SUPERIOR COURT.

Lincoln F. Brigham . . . . .	Salem . . . . .	Chief Justice . . . . .	Jan. 28, 1869.
Julius Rockwell . . . . .	Pittsfield . . . . .	Associate Justice . . . . .	May 19, 1869.
Otis P. Lord . . . . .	Salem . . . . .	" "	May 19, 1869.
Ezra Wilkinson . . . . .	Dedham . . . . .	" "	May 19, 1869.
John Phelps Putnam . . . . .	Boston . . . . .	" "	May 31, 1869.
Chester I. Reed . . . . .	Taunton . . . . .	" "	April 17, 1867.
Charles Devens, Jr. . . . .	Worcester . . . . .	" "	April 17, 1867.
Henry A. Scudder . . . . .	Dorchester . . . . .	" "	Feb. 2, 1869.
Francis H. Dewey . . . . .	Worcester . . . . .	" "	Feb. 6, 1869.
Robert C. Pitman . . . . .	New Bedford . . . . .	" "	May 18, 1869.

## JUDGES OF PROBATE AND INSOLVENCY.

				When appointed.
Barnstable County,	Joseph M. Day . . . . .	Barnstable . . . . .	May	13, 1858.
Berkshire	" James T. Robinson . . . . .	Adams . . . . .	Jan.	29, 1859.
Bristol	" Edmund H. Bennett . . . . .	Taunton . . . . .	May	13, 1858.
Dukes	" Theodore G. Mayhew . . . . .	Edgartown . . . . .	May	13, 1858.
Essex	" George F. Choate . . . . .	Salem . . . . .	May	13, 1858.
Franklin	" Charles Mattoon . . . . .	Greenfield . . . . .	May	13, 1858.
Hampden	" William S. Shurtleff . . . . .	Springfield . . . . .	Sept.	10, 1863.
Hampshire	" Samuel F. Lyman . . . . .	Northampton . . . . .	May	17, 1858.
Middlesex	" William A. Richardson . . . . .	Lowell . . . . .	May	13, 1858.
Nantucket	" Edward M. Gardner . . . . .	Nantucket . . . . .	May	13, 1858.
Norfolk	" George White . . . . .	Quincy . . . . .	May	15, 1858.
Plymouth	" William H. Wood . . . . .	Middleborough . . . . .	May	13, 1858.
Suffolk	" Isaac Ames . . . . .	Boston . . . . .	May	13, 1858.
Worcester	" Henry Chapin . . . . .	Worcester . . . . .	May	13, 1858.

## JUSTICES OF POLICE AND MUNICIPAL COURTS.

- ADAMS. — *Justice*: Joel Bacon. *Special Justices*: Charles Marsh, Henry P. Phillips.
- BOSTON (*Municipal Court*). — *Chief Justice*: John W. Bacon. *Associate Justices*: Mellen Chamberlain, Francis W. Hurd. (*Municipal Court of Southern District*.) — *Justice*: Peter S. Wheelock. *Special Justices*: Ira Allen, Solomon A. Bolster.
- CAMBRIDGE. — *Justice*: John S. Ladd. *Special Justices*: George W. Livermore, Henry W. Muzzey.
- CHARLESTOWN. — *Justice*: George W. Warren. *Special Justices*: Charles D. Dunton, John W. Pettengill.
- CHELSEA. — *Justice*: Hamlet Bates. *Special Justices*: Erastus Rugg, Hosea Halsey.
- CHICOPPEE. — *Justice*: Edwin O. Carter. *Special Justices*: Moses W. Chapin, Charles Sherman.
- FALL RIVER. — *Justice*: Lewis Lapham. *Special Justice*: James Ford.
- FITCHBURG. — *Justice*: Thornton K. Ware. *Special Justices*: David H. Merriam, Edward P. Loring.
- GLOUCESTER. — *Justice*: James Davis. *Special Justice*: Elbridge G. Friend.
- HAVERTHILL. — *Justice*: Henry Carter. *Special Justices*: Thorndike D. Hodges, William E. Blunt.
- LAWRENCE. — *Justice*: William Stevens. *Special Justices*: William H. P. Wright, Gilbert E. Hood.
- LEE. — *Justice*: Isaac C. Ives. *Special Justices*: James Bullard, Franklin W. Gibbs.
- LOWELL. — *Justice*: Nathan Crosby. *Special Justices*: George Stevens, John Davis.
- LYNN. — *Justice*: James R. Newhall. *Special Justice*: Nathan M. Hawkes.

- MILFORD.—*Justice*: Charles A. Dewey, Jr. *Special Justices*: Elias Whitney, James R. Davis.
- NEW BEDFORD.—*Justice*: Alanson Borden. *Special Justices*: Edmund Anthony, W. W. Crapo.
- NEWBURYPORT.—*Justice*: William E. Currier. *Special Justices*: Henry W. Chapman, John N. Pike.
- PITTSFIELD (*District Court for Central Berkshire*).—*Justice*: Henry S. Briggs. *Special Justices*: John Tatlock, Lyman Payne.
- SALEM.—*Justice*: Joseph G. Waters. *Special Justices*: Stephen P. Webb, J. B. F. Osgood.
- SPRINGFIELD.—*Justice*: James H. Morton. *Special Justices*: Charles A. Winchester, Edward Morris.
- TAUNTON (*Municipal Court*).—*Justice*: William H. Fox. *Associate Justice*: William E. Fuller.
- WILLIAMSTOWN.—*Justice*: John R. Bulkley. *Special Justices*: Andrew M. Smith, Henry L. Sabin.
- WORCESTER (*Municipal Court*).—*Justice*: Hartley Williams. *Special Justice*: Joseph A. Titus.

---

TRIAL JUSTICES.

(Gen. St. c. 120, ss. 33, 34.)

- BARNSTABLE.—*Chatham*, Isaac Bea; *Falmouth*, Richard S. Wood; *Hyannis*, Theodore F. Bassett; *Provincetown*, Benjamin F. Hutchinson; *Sandwich*, E. Stowell Whittemore; *South Dennis*, Marshall S. Underwood; *Yarmouth*, James B. Crocker.
- BRISTOL.—*Attleborough*, Henry Rice; *Easton*, Albert A. Rotch; *Freetown*, Ebenezer W. Peirce; *Mansfield*, Erastus M. Reed; *Norton*, Austin Messenger; *Somerset*, Jonathan B. Slade; *Swanzy*, Mason Barney, Jr.; *Taunton*, James P. Ellis; *Westport*, George H. Gifford.
- BERKSHIRE.—*Becket*, William S. Huntington; *Florida*, Nahum P. Brown; *Great Barrington*, Billings Palmer; *Hinsdale*, Charles J. Kittredge; *Lenox*, William S. Tucker; *New Marlborough*, Harlow S. Underwood; *Sandisfield*, Orlow Walcott; *Sheffield*, Oliver Peck; *Stockbridge*, Henry J. Dunham; *West Stockbridge*, William C. Spaulding.
- DUKES.—*Edgartown*, Jeremiah Pease; *Tisbury*, Thomas N. Hillman.
- ESSEX.—*Amesbury*, George Turner; *Andover*, George H. Poor; *Beverly*, James Hill; *Danvers*, David Mead; *Essex*, David Choate; *Georgetown*, Orland B. Tenney; *Ipswich*, Joseph Farley; *Marblehead*, William Fabens; *Methuen*, William M. Rogers; *Rockport*, Henry Dennis; *Rowley*, J. Scott Todd; *Salisbury*, George W. Cate; *Saugus*, Augustus B. Davis.
- FRANKLIN.—*Charlemont*, Richard E. Field; *Conway*, Henry W. Billings; *Greenfield*, Wendell T. Davis, Almon Brainard; *Leverett*, Luther Dudley; *New Salem*, Willard Putnam; *Montague*, Sanford Goddard; *Orange*, Hiram Woodward; *Shelburne Falls*, Samuel D. Bardwell; *Sunderland*, Albert Montague.
- HAMPDEN.—*Holyoke*, William B. C. Pearsons, Porter Underwood; *Monson*,

- Joshua Tracy; *Palmer*, Gamaliel Collins, Charles L. Gardner; *Russell*, Nelson D. Parks; *South Wilbraham*, Solomon C. Spellman; *Westfield*, Samuel Fowler, Henry B. Lewis; *West Granville*, James M. Goodwin.
- HAMPSHIRE.**—*Amherst*, Oliver Pease; *Belchertown*, Franklin Dickinson; *Easthampton*, William G. Bassett; *Enfield*, Charles Richards; *Huntington*, Alfred M. Copeland; *Northampton*, C. Edgar Smith; *South Hadley*, R. Ogden Dwight; *Ware*, Franklin D. Richards; *Worthington*, Elisha H. Brewster.
- MIDDLESEX.**—*Arlington*, Ira O. Carter; *Ashland*, William Seaver; *Concord*, Joseph Reynolds; *Frammingham*, Colman S. Adams; *Holliston*, Alden Leland; *Groton*, Samuel W. Rowe; *Hopkinton*, John Augustus Woodbury; *Hudson*, James T. Joslin; *Lexington*, Augustus E. Scott; *Malden*, John W. Pettengill; *Medford*, Benjamin F. Hayes; *Melrose*, Andrew H. Briggs; *Natick*, George L. Sleeper; *Newton*, Stephen W. Trowbridge, Cephas Brigham; *Shirley*, David Porter; *Somerville*, Francis Tufts; *South Reading*, Edward A. Upton; *Stoneham*, Moses L. Morse, Dexter Bucknam; *Sudbury*, Asahel Balcom; *Tewksbury*, Richard Tolman (special); *Townsend*, Levi Stearns; *Waltham*, Josiah Rutter; *Watertown*, Henderson J. Edwards; *Wayland*, David Heard; *Westford*, Luther Prescott; *Woburn*, Joshua P. Converse.
- NANTUCKET.**—*Nantucket*, William Barney, Frederick A. Chase.
- NORFOLK.**—*Brookline*, Bradford Kingman; *Canton*, Charles Endicott; *Cohasset*, Solomon J. Beal; *Dedham*, Frederick D. Ely; *Dorchester*, Thomas F. Temple; *Franklin*, Edmund Davis; *Hyde Park*, Willard F. Estey; *Milton*, Charles M. S. Churchill; *Needham*, Emery Grover; *Quincy*, William S. Morton, John Quincy Adams; *Randolph*, J. White Belcher; *Stoughton*, Caleb Blodgett, Jr.; *West Medway*, Charles H. Deans; *West Roxbury*, James Hewins; *Weymouth*, Everett C. Bumpus; *Wrentham*, Samuel Warner.
- PLYMOUTH.**—*Abington*, Otis W. Soule; *Bridgewater*, Lewis Holmes, Elisha G. Leach; *East Bridgewater*, William H. Osborne; *Hingham*, James S. Lewis; *North Bridgewater*, Jonas R. Perkins; *Middleborough*, Cornelius B. Wood; *Plymouth*, Albert Mason; *Scituate*, Caleb W. Prouty; *Wareham*, William Bates, Seth Miller.
- WORCESTER.**—*Athol*, Franklin R. Haskell; *Barre*, Edwin Woods; *Blackstone*, Theodore S. Johnson; *Brookfield*, George S. Duell; *Clinton*, Daniel H. Bemis; *East Douglas*, Samuel W. Heath; *Grafton*, James W. White; *Hardwick*, James P. Fay; *Holden*, David F. Parmenter, *Leominster*, Charles H. Merriam; *Millbury*, George A. Flagg; *Northborough*, Samuel Clark; *North Brookfield*, J. Evarts Greene; *Southbridge*, Sylvester Dresser; *Spencer*, Luther Hill; *Templeton*, E. Wyman Stone; *Upton*, Velorous Taft; *Uxbridge*, Zadock A. Taft; *Warren*, Joseph F. Hitchcock; *Webster*, John H. Stockwell; *Westborough*, Samuel M. Griggs; *West Boylston*, Ebenezer M. Hosmer; *Winchendon*, Bethuel Ellis; *Worcester*, Henry C. Rice.

---

#### ATTORNEY GENERAL.

Charles Allen . . . . .	Greenfield.
James C. Davis, <i>Assistant</i> . . . . .	Boston.

## DISTRICT ATTORNEYS.

Suffolk District . . . .	J. Wilder May . . . . .	Boston.
	Patrick R. Guiney, <i>Assistant</i> . .	Boston.
Northern " . . . .	Isaac S. Morse . . . . .	Cambridge.
Eastern " . . . .	Edgar J. Sherman . . . . .	Lawrence.
Southern " . . . .	George Marston . . . . .	Barnstable.
South-eastern District . .	Edward L. Pierce . . . . .	Milton.
Middle District . . . .	William W. Rice . . . . .	Worcester.
Western District . . . .	Edward B. Gillett . . . . .	Westfield.
North-western District . .	Samuel T. Spaulding . . . . .	Northampton.

## CLERKS OF COURTS.

Barnstable County . . . .	James B. Crocker . . . . .	Yarmouth.
Berkshire " . . . .	Henry W. Taft . . . . .	Lenox.
Bristol " . . . .	Simeon Borden . . . . .	Fall River.
Dukes " . . . .	Richard L. Pease . . . . .	Edgartown.
Essex " . . . .	Asahel Huntington . . . . .	Salem.
Franklin " . . . .	Edward E. Lyman . . . . .	Greenfield.
Hampden " . . . .	George B. Morris . . . . .	Springfield.
Hampshire " . . . .	William P. Strickland . . . . .	Northampton.
Middlesex " . . . .	Benjamin F. Ham . . . . .	Winchester.
Nantucket " . . . .	George Cobb . . . . .	Nantucket.
Norfolk " . . . .	Erastus Worthington . . . . .	Dedham.
Plymouth " . . . .	William H. Whitman . . . . .	Plymouth.
Suffolk " . . . .	{ George C. Wilde (Sup. Jud. Court } for the County and Comm'lth)	Boston.
" " . . . .	{ Joseph A. Willard (Superior Court, } Civil Business)	"
" " . . . .	{ Francis H. Underwood (Superior } Court, Criminal Business)	"
Worcester " . . . .	Joseph Mason . . . . .	Worcester.

## REGISTERS OF PROBATE AND INSOLVENCY.

Barnstable County . . . .	Jonathan Higgins . . . . .	Orleans.
Berkshire " . . . .	Andrew J. Waterman . . . . .	Lenox.
Bristol " . . . .	William E. Fuller . . . . .	Taunton.
Dukes " . . . .	Hebron Vincent . . . . .	Edgartown.
Essex " . . . .	Abner C. Goodell . . . . .	Salem.
Franklin " . . . .	Chester C. Conant . . . . .	Greenfield.
Hampden " . . . .	Samuel B. Spooner . . . . .	Springfield.
Hampshire " . . . .	Luke Lyman . . . . .	Northampton.
Middlesex " . . . .	Joseph H. Tyler . . . . .	Cambridge.
Nantucket " . . . .	Thaddeus C. Defriez . . . . .	Nantucket.

Norfolk County	. . .	Jonathan H. Cobb	. . . . .	Dedham.
Plymouth	„	Daniel E. Damon	. . . . .	Plymouth.
Suffolk	„	William C. Brown	. . . . .	Chelsea.
Worcester	„	Charles E. Stevens	. . . . .	Worcester.

## SHERIFFS AND DEPUTY SHERIFFS.

## BARNSTABLE COUNTY.

*Sheriff.*

DAVID BURSLEY, of Barnstable; term expires January, 1872.

*Deputies.*

*Barnstable.* — Thomas Harris.

*Brewster.* — Strabo Clark.

*Dennis Port.* — Isaiah C. Inman.

*Falmouth.* — Isaac S. Lawrence.

*Harwich Port.* — Elbridge G. Doane.

*Provincetown.* — Robert Knowles.

*Sandwich.* — Ezra T. Pope.

*Wellsfleet.* — Reuben C. Sparrow.

*Yarmouth.* — Benjamin H. Mathews.

## BERKSHIRE COUNTY.

*Sheriff.*

GRAHAM A. ROOT, of Sheffield; term expires January, 1872.

*Deputies.*

*Adams.* — William G. Farnsworth.

*Adams (North).* — William Hodskin,  
Josiah Q. Robinson.

*Becket.* — Timothy F. Snow.

*Great Barrington.* — Harvey Holmes,  
F. G. Abbey.

*Hinsdale.* — J. M. Tuttle.

*Lanesborough.* — J. W. Newton, Henry  
H. Newton.

*Lee.* — A. H. Pease, Moses H. Pease,  
Otis S. Lyman.

*Lenox.* — Phineas Cone, Hiram B. Wel-  
lington.

*Otis.* — Edward L. Day.

*Peru.* — George Wells.

*Pittsfield.* — John Crosby, Jr.

*Sandisfield.* — Eliud Taylor.

*Sheffield.* — George B. Cook.

*Stockbridge.* — Horace B. Streeter.

*Tyringham.* — Lucien B. Moore.

*West Stockbridge.* — George H. Cobb.

*Williamstown.* — Samuel B. Kellogg.

## BRISTOL COUNTY.

*Sheriff.*

WILLIAM S. CORB, of New Bedford; term expires November, 1869.

*Deputies.*

*Attleborough.* — James W. Riley, Quin-  
cey A. Hooper.

*Dartmouth.* — William Barker, Jr.

*Easton.* — Rufus H. Willis.

*Fairhaven.* — A. G. Liscomb.

*Fall River.* — James Wixon, Franklin  
Gray, Joseph Healey.

*Freetown (Assonet).* — George D. Wil-  
liams, Guilford Hathaway.

*Manassett.* — Alson W. Cobb.

*New Bedford.* — Charles D. Burt, Horatio N. Kimball, John W. Nickerson.

*Norton.* — George H. Arnold.

*Raynham.* — Samuel W. Robinson.

*Somerset.* — Edmund Buffinton.

*Swansey.* — James Barney.

*Taunton.* — Isaac G. Carrier, Henry F. Cobb, Orrin M. Ingalls, George H.

Babbitt, Jr., Peter C. Thayer.

*Taunton (East).* — Chauncey G. Washburn.

## DUKES COUNTY.

*Sheriff.*

SAMUEL KENISTON, of Edgartown; term expires January, 1872.

*Deputies.*

*Chilmark.* — Thomas H. Lambert.

| *Holmes Hole.* — J. Whelden Holmes.

## ESSEX COUNTY.

*Sheriff.*

HORATIO G. HERRICK, of Lawrence; term expires January, 1872.

*Deputies.*

*Amesbury.* — Joseph T. Clarkson.

*Andover.* — E. Kendall Jenkins.

*Danvers.* — Charles H. Adams.

*Essex.* — Ezra Perkins, Jr.

*Georgetown.* — Otis Thompson, George W. Boynton.

*Gloucester.* — George Lane.

*Haverhill.* — Phineas E. Davis, David Boynton.

*Ipswich.* — Joseph Spiller.

*Lawrence.* — Alanson Briggs, James M. Currier, John P. Bradstreet. (*At jail.*)

*Lynn.* — Charles Merritt.

*Methuen.* — Charles E. Goss.

*Newburyport.* — John Akerman, James W. Cheney.

*Peabody.* — Stephen Upton.

*Salem.* — Daniel Potter, John D. Cross.

## FRANKLIN COUNTY.

*Sheriff.*

SOLOMON C. WELLS, of Greenfield; term expires January, 1872.

*Deputies.*

*Ashfield.* — Job Lilley.

*Charlemont.* — Charles Peck.

*Colrain.* — Shubael B. Buck.

*Conway.* — George C. Kaulback.

*Deerfield (South).* — Austin Ware.

*Greenfield.* — Lorenzo D. Joslyn, Geo.

A. Kimball, Chauncey Bryant.

*Montague.* — William W. Thayer.

*Northfield.* — Elisha Alexander.

*New Salem.* — Alvah B. Oatman.

*Orange.* — Wilson Wheeler, James H. Clark.

*Shelburne.* — Henry S. Swan.

*Shutesbury.* — John H. Forbes.

*In Hampshire County.*

*Amherst.* — Frederick A. Palmer.

| *Northampton.* — Ansel Wright, Jr.



## HAMPDEN COUNTY.

*Sheriff.*

ADDISON M. BRADLEY, of Springfield; term expires January, 1872.

*Deputies.*

*Blandford.* — W. H. H. Blair.  
*Chicopee.* — Nathaniel Cutler.  
*Chicopee Falls.* — Morris Morton.  
*Granville.* — E. D. Dickinson.  
*Holyoke.* — T. H. Wellington.  
*Indian Orchard.* — H. C. Fuller.  
*Ludlow.* — D. L. Fuller.  
*Monson.* — Edward P. Newton.  
*Palmer.* — J. S. Loomis.

*Springfield.* — D. A. Adams, A. H. G. Lewis.  
*Thorndike.* — George Moores.  
*Three Rivers.* — George W. Randall.  
*Tolland.* — P. C. L. Slocumb.  
*Westfield.* — T. M. Cooley, L. B. Walkley.  
*Wilbraham (North).* — E. C. Colton.  
*Wilbraham (South).* — F. K. Lathrop.

*In Hampshire County.**Huntington.* — Gilbert S. Lewis.*Northampton.* — Ansel Wright.

## HAMPSHIRE COUNTY.

*Sheriff.*

HENRY A. LONGLEY, of Northampton; term expires January, 1872.

*Deputies.*

*Amherst.* — Frederick A. Palmer.  
*Belchertown.* — Samuel W. Longley.  
*Easthampton.* — J. Lyman Campbell.  
*Enfield.* — Henry M. Potter.  
*Hadley.* — Enos E. Cook.  
*Huntington.* — Gilbert S. Lewis.

*Northampton.* — Ansel Wright, Ansel Wright, Jr.  
*Plainfield.* — Leonard Campbell.  
*South Hadley.* — Samuel N. Miller.  
*Ware.* — Samuel H. Phelps.  
*Worthington.* — Edward C. Porter.

*In Hampden County.**Holyoke.* — Thomas H. Wellington.*Westfield.* — L. B. Walkley.*In Franklin County.**Greenfield.* — Lorenzo D. Joslyn, Chauncey Bryant.

## MIDDLESEX COUNTY.

*Sheriff.*

CHARLES KIMBALL, of Lowell; term expires January, 1872.

*Deputies.*

*Cambridge (East).* — Luther L. Parker.  
*Charlestown.* — Lowell W. Chamberlin.  
*Concord.* — John B. Moore.  
*Framingham.* — Joseph G. Bannister.  
*Groton.* — Asa S. Lawrence.  
*Groton Junction.* — Benjamin L. Howe.  
*Hopkinton.* — Jonathan Whittemore.  
*Hudson.* — Charles H. Robinson.

*Lowell.* — James Hopkins, Jefferson Bancroft, William H. Clemence.  
*Melrose.* — John H. Clark.  
*Medford.* — John T. White.  
*Reading.* — Daniel B. Lovejoy.  
*Townsend.* — Benjamin F. Lewis.  
*Waltham.* — Eben W. Fiske.  
*Woburn.* — Horace Collamore.

## NANTUCKET COUNTY.

*Sheriff.*

JOSEPH M'CLEAVE, of Nantucket; term expires January, 1872.

*Deputies. (None.)*

## NORFOLK COUNTY.

*Sheriff.*

JOHN W. THOMAS, of Dedham; term expires January, 1872.

*Deputies.**Canton.* — Rufus C. Wood.*Dedham.* — Augustus B. Endicott.*Dorchester.* — John Robie.*Foxborough.* — Alfred Fales.*Medway.* — Alcander Fairbanks.*Medway (West).* — Valentine R. Coombs.*Milton.* — John D. Bradlee.*Quincy.* — Washington M. French.*Randolph.* — William H. Warren.*Stoughton.* — Hiram Gay.*Weymouth.* — George W. White, Jr.

## PLYMOUTH COUNTY.

*Sheriff.*

JAMES BATES, of Plymouth; term expires January, 1872.

*Deputies.**Abington.* — Josiah Cushman.*Bridgewater.* — P. D. Kingman.*Duxbury.* — William J. Alden.*Hingham.* — G. F. Hersey.*Marshfield.* — John Baker.*Middleborough.* — James Cole, Jr.*North Bridgewater.* — Otis Hayward.*North Carver.* — Benjamin Ransom.*Plymouth.* — John Perkins, John Atwood.*Rochester.* — R. C. Randall.*Scituate.* — J. O. Cole.*South Scituate.* — Willard Torrey.

## SUFFOLK COUNTY.

*Sheriff.*

JOHN M. CLARK, of Boston; term expires January, 1872.

*Deputies.*Benj. F. Bayley, *Court House, Boston.*

John B. Dearborn, " " "

Wm. D. Martin, " " "

Harum Merrill, *Court House, Boston.*

John B. Ingalls, " " "

## WORCESTER COUNTY.

*Sheriff.*

JOHN S. C. KNOWLTON, of Worcester; term expires January, 1872.

*Deputies.*

<i>Athol.</i> — Gardiner Lord, Jr.	<i>Oxford.</i> — Orin W. Chaffee.
<i>Barre.</i> — Daniel Cummings.	<i>Southbridge.</i> — Solomon Thayer.
<i>Blackstone.</i> — Edmund O. Bacon.	<i>Spencer.</i> — Nathan Hersey.
<i>Clinton.</i> — Enoch K. Gibbs.	<i>Uxbridge.</i> — Merrill Green.
<i>Fitchburg.</i> — Francis Buttrick.	<i>Warren.</i> — William Combs.
<i>Gardner.</i> — Lucian W. Brown.	<i>Webster.</i> — Solomon Shumway.
<i>Grafton.</i> — S. Davis Hall.	<i>Winchendon.</i> — Joseph S. Watson.
<i>Milford.</i> — Samuel W. Hayward.	<i>Worcester.</i> — Daniel F. Newton, Frank
<i>North Brookfield.</i> — Luther P. DeLand.	A. Newton, Jonathan B. Sibley.

## SPECIAL CORONERS.

BARNSTABLE . . . . .	<i>Barnstable</i> . . . . .	Thomas Harris.
BERKSHIRE . . . . .	<i>Lenox</i> . . . . .	Hiram B. Wellington.
" . . . . .	<i>Raynham</i> . . . . .	Seth D. Wilbur.
BRISTOL . . . . .	<i>Taunton</i> . . . . .	George H. Babbitt, Jr.
DUKES . . . . .	<i>Edgartown</i> . . . . .	{ Francis Adlington, John S. Smith.
ESSEX . . . . .	<i>Lawrence</i> . . . . .	Wm. D. Lamb, John Stowe.
FRANKLIN . . . . .	<i>Greenfield</i> . . . . .	Alfred Wells.
HAMPSHIRE . . . . .	<i>Northampton</i> . . . . .	Ansel Wright, Jr.
MIDDLESEX . . . . .	<i>Lowell</i> . . . . .	{ Jefferson Bancroft, Thomas W. Pressey, Jeremiah P. Jewett.
NORFOLK . . . . .	<i>Canton</i> . . . . .	Rufus C. Wood.
" . . . . .	<i>Needham</i> . . . . .	George Jennings.
PLYMOUTH . . . . .	<i>Bridgewater</i> . . . . .	Philip D. Kingman.
SUFFOLK . . . . .	<i>Boston</i> . . . . .	{ Charles Smith, Erastus W. Sanborn.
WORCESTER . . . . .	<i>Southborough</i> . . . . .	Curtis Newton.
" . . . . .	<i>Westborough</i> . . . . .	Daniel F. Newton.
" . . . . .	<i>Worcester</i> . . . . .	Jonathan B. Sibley.

## CORONERS.

- BARNSTABLE. — *Barnstable*, David Bursley; *Harwich*, William H. Underwood; *Provincetown*, Jeremiah Stone; *Sandwich*, Isaac K. Chipman; *Truro*, Daniel Paine; *Yarmouth*, Theodore Drew.
- BERKSHIRE. — *Adams*, Isaac Holman; *Dalton*, Joseph W. Russell; *Lee*, Abial H. Pease; *North Adams*, William Hodekin, Nathan S. Babbitt, Josiah Q. Robinson; *Pittsfield*, Walter Tracy, Oliver E. Brewster, Henry M. Peirson; *Williamstown*, Andrew M. Smith, John R. Bulkley.
- BRISTOL. — *Attleborough*, Elijah R. Read, Lyman M. Stanley, John T. Bates; *Easton*, Henry J. Fuller; *Fall River*, Charles C. Dillingham; *Freetown*, Ebenezer W. Peirce; *Manafield*, E. Maltby Reed; *New Bedford*, William O. Russell, Horatio N. Kimball; *Somerset*, Philip Bowers, Edmund Bufinton; *Swanzy*, David B. Gardner.

**DUKES.** — *Tisbury*, John Holmes, jr.

**ESSEX.** — *Amesbury*, George Turner; *Andover*, Stephen Tracy; *Danvers*, Richard Hood; *Georgetown*, Joseph P. Stickney; *Haverhill*, Elbridge G. Eaton; *Lynn*, Otis Newhall, Hiram N. Breed; *Newbury*, George W. Adams; *Newburyport*, Wooster Smith, Edward W. Rand; *Salem*, Eben N. Walton; *Saugus*, Harmon Hall; *West Newbury*, Nehemiah F. Emery.

**FRANKLIN.** — *Deerfield*, Moses Stebbins; *Gill*, Roswell Purple; *Greenfield*, Rufus Howland, Samuel J. Lyons.

**HAMPDEN.** — *Chester*, Herman S. Lucas; *Holyoke*, Charles Blodgett, Luther F. Humeston, Daniel E. Kingsbury; *Southwick*, Joseph W. Rockwell; *Springfield*, Joseph Ingraham, Cornelius F. Coleman, Eliphalet Trask, William L. Smith, William E. Montague; *Westfield*, Jehiel Abbott.

**HAMPSHIRE.** — *Belchertown*, Samuel W. E. Goddard; *Greenwich*, Stephen Douglas; *Hadley*, Eleazer Porter; *Northampton*, Ansel Wright.

**MIDDLESEX.** — *Brighton*, Augustus Mason, Isaac G. Brame; *Cambridge*, Francis H. Brown, William W. Wellington; *Cambridge (East)*, Luther L. Parker, Edward H. Weston; *Charlestown*, Duncan Bradford, Seth W. Lewis; *Chelmsford*, John C. Bartlett; *Concord*, John B. Moore; *Framingham*, Henry Cowles, Joseph G. Bannister, Colman S. Adams; *Groton*, John Q. A. McColester, Asa S. Lawrence; *Groton Junction*, Benjamin L. Howe; *Hudson*, Charles H. Robinson; *Marlboro'*, John M. Farwell, Nahum Wetherbee; *Malden*, Francis C. Swett; *Medford*, John T. White; *Melrose*, William J. Farnsworth; *Natick*, Alexander Coolidge; *Newton*, William P. Houghton, John M. Fisk; *Newton (Lower Falls)*, George T. Perkins; *Pepperell*, James M. Stickney; *Reading*, Horace P. Wakefield; *Sherborn*, Albert H. Blanchard; *Somerville*, John C. Magoun; *Sudbury*, Webster Moore; *Tewksbury*, Benjamin F. Spaulding; *Wakefield*, James O. Boswell; *Waltham*, Ebenezer W. Fiske; *Westford*, Edward Prescott; *Winchester*, Alonzo Chapin; *Woburn*, Thomas J. Porter.

**NORFOLK.** — *Braintree*, Jonathan French; *Cohasset*, John Q. A. Lothrop; *Medway*, Valentine R. Coombs; *Milton*, John D. Bradlee; *Needham*, George K. Daniell; *Quincy*, Lewis Bass; *Randolph*, Ralph Houghton; *Roxbury*, Ira Allen; *Stoughton*, Nathaniel Wales; *West Roxbury*, Joseph Stedman; *Weymouth*, George W. White, Jr.

**PLYMOUTH.** — *Abington*, Isaac Hersey; *Marshfield*, Eliot R. Tilden; *Middleborough*, Ebenezer W. Drake; *North Bridgewater*, Benjamin A. Packard; *Scituate*, John Beal; *Wareham*, Levi A. Runnells.

**SUFFOLK.** — *Boston*, John S. H. Fogg, Paschal Ingalls, Duncan McB. Thaxter, William E. Underwood, David Thayer, Edward B. Moore, Aaron P. Richardson, Richard M. Ingalls, Frederic S. Ainsworth, Ira Allen, Vine H. Fitch, Horace G. Barrows, Arthur H. Wilson, John W. Foye, William M. Cornell, George E. Evans; *Chelsea*, James B. Forsyth, Erastus Rugg; *Winthrop*, Edward Floyd.

**WORCESTER.** — *Brookfield*, William B. Hastings; *Clinton*, Lucius Field; *Fitchburg*, Alfred Miller; *Oxford*, William H. Thurston; *Sturbridge*, Simeon A. Drake, David Wight; *Warren*, Nelson Carpenter; *Webster*, William H. Davis; *Winchendon*, Joseph S. Watson; *Worcester*, Frank H. Rice, J. Marcus Rice.

*Masters in Chancery,*

Appointed by Governor, to hold office for five years, unless sooner removed. Number not to exceed five in any county, except Suffolk, Essex, and Middlesex, in each of which counties the number is to be seven. (Gen. St. c. 121, s. 41. — St. 1868, c. 185.)

County.	Name.	Residence.	When appointed.
Berkshire . .	John Branning . . . .	Lee . . . .	Dec. 16, 1864.
Bristol . . .	Edwin L. Barney . . . .	New Bedford . .	May 23, 1866.
Essex . . . .	Daniel E. Safford . . . .	Hamilton . . . .	Feb. 16, 1865.
" . . . .	George F. Choate . . . .	Salem . . . .	May 15, 1866.
" . . . .	Edgar J. Sherman . . . .	Lawrence . . . .	May 29, 1866.
" . . . .	Nathan W. Harmon . . . .	" . . . .	Feb. 19, 1867.
Franklin . .	Samuel O. Lamb . . . .	Greenfield . . .	Jan. 1, 1867.
" . . . .	Chester C. Conant . . . .	" . . . .	April 7, 1868.
Middlesex . .	Arthur P. Bonney . . . .	Lowell . . . .	Aug. 1, 1865.
" . . . .	Joseph H. Tyler . . . .	E. Cambridge . .	Sept. 11, 1865.
" . . . .	William S. Stearns . . . .	Malden . . . .	Nov. 8, 1865.
" . . . .	William S. Gardner . . . .	Lowell . . . .	April 10, 1867.
" . . . .	Charles F. Howe . . . .	" . . . .	June 4, 1868.
" . . . .	Joseph H. Cotton . . . .	Charlestown . .	July 7, 1869.
Norfolk . . .	Giles H. Rich . . . .	Roxbury . . . .	Mar. 30, 1866.
" . . . .	Thomas L. Wakefield . . .	Dedham . . . .	April 24, 1867.
" . . . .	Richard T. Lombard . . . .	Dorchester . . .	May 15, 1868.
" . . . .	Erastus Worthington . . .	Dedham . . . .	Aug. 29, 1868.
" . . . .	James Hewins . . . .	West Roxbury . .	Feb. 16, 1869.
Plymouth . .	William H. Whitman . . .	Plymouth . . . .	Feb. 10, 1869.
Suffolk . . .	James B. Thayer . . . .	Milton . . . .	Nov. 29, 1864.
" . . . .	Horace H. Coolidge . . . .	Boston . . . .	Mar. 24, 1865.
" . . . .	Robert I. Burbank . . . .	" . . . .	Feb. 1, 1867.
" . . . .	James Bailey Richardson . .	" . . . .	May 26, 1868.
" . . . .	Giles H. Rich . . . .	" . . . .	June 4, 1868.
" . . . .	John Codman . . . .	" . . . .	Dec. 29, 1868.
" . . . .	Charles C. Nutter . . . .	" . . . .	Dec. 29, 1868.
Worcester . .	Hamilton B. Staples . . . .	Milford . . . .	Dec. 16, 1864.
" . . . .	J. Henry Hill . . . .	Worcester . . . .	Jan. 23, 1866.
" . . . .	Hartley Williams . . . .	" . . . .	May 26, 1868.
" . . . .	Joseph Mason . . . .	" . . . .	July 10, 1868.
" . . . .	Henry C. Rice . . . .	" . . . .	July 24, 1868.

*Public Administrators,*

Appointed by Governor, to hold office during the pleasure of the Executive. (Gen. St. c. 95, s. 1.)

County.	Name.	Residence.	When appointed.
Barnstable .	George Marston . . . .	Barnstable . . .	Oct. 3, 1849.
" . . . .	Solomon Davis . . . .	Truro . . . .	Oct. 3, 1849.

County.	Name.	Residence.	When appointed.
Berkshire . . . . .	Henry J. Dunham . . . . .	Stockbridge . . . . .	Mar. 30, 1866.
Bristol . . . . .	William W. Crapo . . . . .	New Bedford . . . . .	Feb. 27, 1857.
" . . . . .	Ebenezer W. Pierce . . . . .	Freetown . . . . .	Jan. 21, 1857.
" . . . . .	Edwin L. Barney . . . . .	New Bedford . . . . .	July 31, 1862.
" . . . . .	Charles T. Bonney . . . . .	" . . . . .	May 14, 1864.
Dukes . . . . .	Samuel G. Vincent . . . . .	Edgartown . . . . .	Nov. 27, 1860.
" . . . . .	Joseph T. Pease . . . . .	" . . . . .	April 7, 1868.
Essex . . . . .	Edmund Smith . . . . .	Newburyport . . . . .	Mar. 24, 1858.
" . . . . .	Edwin Joselyn . . . . .	Salem . . . . .	June 28, 1854.
" . . . . .	Benjamin A. Gray . . . . .	" . . . . .	April 19, 1855.
" . . . . .	George Foster . . . . .	Andover . . . . .	Aug. 8, 1858.
" . . . . .	Elijah P. Robinson . . . . .	Saugus . . . . .	Jan. 7, 1868.
" . . . . .	David W. Low . . . . .	Gloucester . . . . .	June 28, 1867.
Franklin . . . . .	Humphrey Stevens . . . . .	Greenfield . . . . .	Jan. 10, 1868.
Hampden . . . . .	James G. Allen . . . . .	Palmer . . . . .	June 18, 1861.
" . . . . .	Joseph Ingraham . . . . .	Springfield . . . . .	Mar. 30, 1866.
Hampshire . . . . .	Otis Lane . . . . .	Ware . . . . .	Mar. 8, 1858.
" . . . . .	Samuel L. Parsons . . . . .	Northampton . . . . .	Mar. 29, 1860.
Middlesex . . . . .	Duncan Bradford . . . . .	Charlestown . . . . .	Mar. 28, 1858.
" . . . . .	Jonathan Ladd . . . . .	Lowell . . . . .	Dec. 12, 1860.
" . . . . .	Charles D. Dunton . . . . .	Charlestown . . . . .	Aug. 22, 1867.
" . . . . .	George Stevens . . . . .	Lowell . . . . .	Mar. 5, 1868.
Nantucket . . . . .	George Cobb . . . . .	Nantucket . . . . .	Feb. 28, 1859.
Norfolk . . . . .	Ira Cleveland . . . . .	Dedham . . . . .	April 11, 1839.
Plymouth . . . . .	Joseph S. Beal . . . . .	Kingston . . . . .	July 8, 1841.
" . . . . .	Samuel Stetson . . . . .	Duxbury . . . . .	July 28, 1855.
Suffolk . . . . .	Francis E. Parker . . . . .	Boston . . . . .	June 7, 1848.
" . . . . .	Timothy Bigelow . . . . .	" . . . . .	Dec. 16, 1850.
" . . . . .	Lorenzo S. Cragin . . . . .	" . . . . .	Feb. 16, 1855.
" . . . . .	Joseph F. Clark . . . . .	" . . . . .	Mar. 28, 1856.
" . . . . .	James Schouler . . . . .	" . . . . .	Nov. 4, 1863.
Worcester . . . . .	Adam Harrington . . . . .	Shrewsbury . . . . .	July 1, 1851.
" . . . . .	Thomas Billings . . . . .	Lunenburg . . . . .	Jan. 16, 1867.

### *Commissioners of Insolvency.*

County.	Name.	Residence.
Barnstable . . . . .	John W. Sears . . . . .	Yarmouth.
" . . . . .	Robert H. Libby . . . . .	Wellfleet.
" . . . . .	Erasmus Gould . . . . .	Falmouth.
Berkshire . . . . .	Andrew J. Waterman . . . . .	Lenox.
" . . . . .	Arnold G. Potter . . . . .	North Adams.
" . . . . .	Edgar M. Wood . . . . .	Pittsfield.
Bristol . . . . .	E. Maltby Reed . . . . .	Mansfield.
" . . . . .	George Edgar Williams . . . . .	Taunton.

County.	Name.	Residence.
Bristol . . . . .	Charles W. Clifford . . . . .	New Bedford.
Dukes . . . . .	Frederick W. Manter . . . . .	Tisbury.
" . . . . .	James O. Lambert . . . . .	Chilmark.
" . . . . .	Archibald Mellen . . . . .	Edgartown.
Essex . . . . .	William P. Upham . . . . .	Salem.
" . . . . .	William L. Thompson . . . . .	Lawrence.
" . . . . .	William E. Currier . . . . .	Newburyport.
Franklin . . . . .	Hiram Woodward . . . . .	Orange.
" . . . . .	George W. Bartlett . . . . .	Greenfield.
" . . . . .	H. M. Puffer . . . . .	Shelburne.
Hampden . . . . .	Henry B. Lewis . . . . .	Westfield.
" . . . . .	Charles C. Wright . . . . .	Agawam.
" . . . . .	James G. Allen . . . . .	Palmer.
Hampshire . . . . .	Franklin Dickinson . . . . .	Belchertown.
" . . . . .	William P. Strickland . . . . .	Northampton.
" . . . . .	Charles S. Richards . . . . .	Enfield.
Middlesex . . . . .	George Stevens . . . . .	Lowell.
" . . . . .	William B. Gale . . . . .	Marlborough.
" . . . . .	John W. Hammond . . . . .	Cambridge.
Nantucket . . . . .	George Cobb . . . . .	Nantucket.
" . . . . .	William Barney . . . . .	"
" . . . . .	William Cobb . . . . .	"
Norfolk . . . . .	William E. Jewell . . . . .	Randolph.
" . . . . .	Frederick D. Ely . . . . .	Dedham.
" . . . . .	Thomas F. Temple . . . . .	Dorchester.
Plymouth . . . . .	Jacob B. Harris . . . . .	Abington.
" . . . . .	John J. Russell . . . . .	Plymouth.
" . . . . .	Jonas R. Perkins . . . . .	No. Bridgewater.
Suffolk . . . . .	David H. Coolidge . . . . .	Boston.
" . . . . .	Joseph Willard . . . . .	"
" . . . . .	William G. Colburn . . . . .	"
Worcester . . . . .	David H. Merriam . . . . .	Fitchburg.
" . . . . .	Arthur G. Biscoe . . . . .	Westborough.
" . . . . .	Frank P. Goulding . . . . .	Worcester.
" . . . . .	Farwell F. Fay . . . . .	Athol.

---

REGISTERS OF DEEDS.

Barnstable . . . . .	Frederick Scudder . . . . .	Barnstable.
Berkshire (North District)	Richard Whitney . . . . .	Lanesborough.
" (Middle District)	George J. Tucker . . . . .	Lenox.
" (South District)	Isaac Seeley . . . . .	Gt. Barrington.
Bristol (North District)	Joseph Wilbar . . . . .	Taunton.
" (South District)	Charles C. Sayer . . . . .	New Bedford.
Dukes County . . . . .	John S. Smith . . . . .	Edgartown.
Essex (North District).	Gilbert E. Hood . . . . .	Lawrence.
" (South District).	Ephraim Brown . . . . .	Salem.

County.	Name.	Residence.
Franklin . . . . .	Humphrey Stevens . . . . .	Greenfield.
Hampden . . . . .	James E. Russell . . . . .	Springfield.
Hampshire . . . . .	Harvey Kirkland . . . . .	Northampton.
Middlesex (North District)	Ithamar W. Beard . . . . .	Lowell.
" (South District)	Charles B. Stevens . . . . .	Cambridge.
Nantucket . . . . .	William H. Wait . . . . .	Nantucket.
Norfolk . . . . .	James Foord . . . . .	Dedham.
Plymouth . . . . .	William S. Danforth . . . . .	Plymouth.
Suffolk . . . . .	James Rice . . . . .	Boston.
Worcester . . . . .	Alexander H. Wilder . . . . .	Worcester.

COMMISSIONERS FOR MASSACHUSETTS, TO TAKE DEPOSITIONS,  
ACNOWLEDGMENTS, &c., IN OTHER STATES.

Appointed by Governor, to hold office for three years, unless sooner removed. (Gen. St. c. 14, ss. 41-44.)

State.	Name.	City or Town.	When Appointed.
Maine . . . . .	John E. Godfrey . . . . .	Bangor . . . . .	Feb. 26, 1867.
" . . . . .	John H. Kimball . . . . .	Bath . . . . .	May 14, 1867.
" . . . . .	John Walker May . . . . .	Auburn . . . . .	Sept. 24, 1867.
" . . . . .	Enoch B. Harvey . . . . .	Calais . . . . .	April 30, 1868.
New Hampshire . . . . .	Charles W. Woodman . . . . .	Dover . . . . .	Dec. 4, 1866.
" . . . . .	John K. Mills . . . . .	Mason Village . . . . .	Feb. 25, 1868.
" . . . . .	Charles G. Conner . . . . .	Exeter . . . . .	Oct. 5, 1868.
" . . . . .	William H. Hackett . . . . .	Portsmouth . . . . .	Nov. 5, 1868.
" . . . . .	Francis A. Faulkner . . . . .	Keene . . . . .	Aug. 4, 1869.
" . . . . .	Asa Fowler . . . . .	Concord . . . . .	Sept. 21, 1869.
Rhode Island . . . . .	Francis Brinley . . . . .	Newport . . . . .	Aug. 9, 1867.
" . . . . .	Henry Martin . . . . .	Providence . . . . .	Feb. 11, 1869.
Connecticut . . . . .	Charles E. Fellowes . . . . .	Hartford . . . . .	Nov. 15, 1866.
" . . . . .	John H. Bario . . . . .	Meriden . . . . .	Jan. 11, 1867.
" . . . . .	Charles J. Hoadly . . . . .	Hartford . . . . .	May 1, 1867.
" . . . . .	Ebenezer Learned . . . . .	Norwich . . . . .	July 31, 1867.
" . . . . .	John T. Wait . . . . .	" . . . . .	Feb. 23, 1869.
" . . . . .	Edward Goodman . . . . .	Hartford . . . . .	June 17, 1869.
" . . . . .	William Hamersley . . . . .	" . . . . .	July 26, 1869.
New York . . . . .	George F. Danforth . . . . .	Rochester . . . . .	Oct. 1, 1866.
" . . . . .	Moses B. Maclay . . . . .	New York . . . . .	Oct. 8, 1866.
" . . . . .	Stephen L. Magoun . . . . .	Hudson . . . . .	Nov. 15, 1866.
" . . . . .	M. M. Livingston . . . . .	New York . . . . .	Dec. 18, 1866.
" . . . . .	Charles Nettleton . . . . .	" . . . . .	" "
" . . . . .	Francis C. Bowman . . . . .	" . . . . .	" "
" . . . . .	Thomas L. Thornell . . . . .	" . . . . .	Jan. 1, 1867.
" . . . . .	Samuel Swan, M.D. . . . .	" . . . . .	Feb. 12, 1867.



# 600 · LIST OF STATE AND COUNTY OFFICERS.

State.	Name.	City or Town.	When appointed.
New York . . .	James H. Fay . . .	New York . . .	Feb. 13, 1867.
" . . .	Joseph W. Wildey . .	" . . .	April 9, 1867.
" . . .	Isaac Spencer Smith . .	" . . .	May 21, 1867.
" . . .	Frederick I. King . . .	" . . .	May 7, 1867.
" . . .	Matthew H. Ellis . . .	" . . .	May 21, 1867.
" . . .	Alexander Ostrander . .	" . . .	June 7, 1867.
" . . .	William Furniss . . .	" . . .	June 28, 1867.
" . . .	Michael Phillips . . .	" . . .	" "
" . . .	Nathaniel A. Prentiss . .	" . . .	" "
" . . .	Frederick R. Anderson .	" . . .	July 5, 1867.
" . . .	William F. Lett . . .	" . . .	July 22, 1867.
" . . .	James S. Gibbs . . .	Buffalo . . .	July 31, 1867.
" . . .	Sigismond Lasar . . .	New York . . .	Aug. 9, 1867.
" . . .	James W. Hale . . .	" . . .	" "
" . . .	William A. Abbott . . .	" . . .	Aug. 22, 1867.
" . . .	Horace Graves . . .	" . . .	Sept. 24, 1867.
" . . .	Henry B. Hammond . . .	" . . .	Oct. 10, 1867.
" . . .	John Bissell . . .	" . . .	" "
" . . .	Josiah Porter . . .	" . . .	Oct. 26, 1867.
" . . .	George B. Morris, Jr. . .	" . . .	Jan. 11, 1868.
" . . .	James B. Bullock . . .	" . . .	Feb. 7, 1868.
" . . .	Jedd P. C. Cotterill . .	" . . .	" "
" . . .	William F. Goodwin . .	Brooklyn . . .	Feb. 25, 1868.
" . . .	Clarence M. Hyde . . .	New York . . .	" "
" . . .	John Adriance . . .	" . . .	Mar. 11, 1868.
" . . .	John Butcher . . .	" . . .	Mar. 13, 1868.
" . . .	Charles P. Hartt . . .	" . . .	Mar. 26, 1868.
" . . .	Sylvester Lay . . .	" . . .	April 8, 1868.
" . . .	Christian Von Hesse . .	" . . .	April 16, 1868.
" . . .	Edmund B. Barnum . . .	" . . .	May 5, 1868.
" . . .	D. Edwin Conery . . .	Plattsburgh . .	" "
" . . .	DeLancey Crittenden . .	Rochester . . .	May 15, 1868.
" . . .	Fisher A. Baker . . .	New York . . .	" "
" . . .	Josiah H. Bissell . . .	Rochester . . .	May 26, 1868.
" . . .	William H. Barker . . .	New York . . .	July 31, 1868.
" . . .	Henry C. Banks . . .	" . . .	Aug. 8, 1868.
" . . .	Henry Charles Howell . .	" . . .	Aug. 22, 1868.
" . . .	Worthington Frothingham	Albany . . .	Sept. 5, 1868.
" . . .	Edwin F. Corey . . .	New York . . .	Sept. 30, 1868.
" . . .	Theodore Hinsdale . . .	Brooklyn . . .	Oct. 10, 1868.
" . . .	Rufus K. McHarg . . .	New York . . .	Oct. 26, 1868.
" . . .	James M. Ball . . .	" . . .	" "
" . . .	William L. Gardner . . .	" . . .	Nov. 14, 1868.
" . . .	John Whipple . . .	" . . .	" "
" . . .	Frederic N. Dodge . . .	" . . .	" "
" . . .	George R. Jaques . . .	" . . .	" "
" . . .	Charles H. Hatch . . .	" . . .	Nov. 21, 1868.
" . . .	William S. Dunn . . .	" . . .	Nov. 28, 1868.

State.	Name.	City or Town.	When appointed.
New York . . .	Nathaniel Gill . . .	New York . . .	Jan. 5, 1869.
" . . .	Thomas Sadler . . .	" . . .	Jan. 26, 1869.
" . . .	Dexter A. Hawkins . .	" . . .	Feb. 18, 1869.
" . . .	Franklin A. Wilcox . .	" . . .	Feb. 25, 1869.
" . . .	George W. Colles . . .	" . . .	Feb. 28, 1869.
" . . .	Joseph B. Nones . . .	" . . .	Mar. 8, 1869.
" . . .	Samuel B. Goodale . .	" . . .	" "
" . . .	Dana L. Hubbard . . .	" . . .	Mar. 4, 1869.
" . . .	J. Leander Starr . . .	" . . .	Mar. 11, 1869.
" . . .	Judson Jarvis . . .	" . . .	Mar. 16, 1869.
" . . .	William H. Russell . .	" . . .	April 2, 1869.
" . . .	Horatio C. King . . .	" . . .	April 7, 1869.
" . . .	David P. Hall, Jr. . .	" . . .	April 20, 1869.
" . . .	Horace Andrews . . .	" . . .	May 18, 1869.
" . . .	Peter J. Gage . . .	" . . .	May 26, 1869.
" . . .	Frederick B. Swift . .	" . . .	June 2, 1869.
" . . .	Charles L. Alden . . .	Troy . . .	June 15, 1869.
" . . .	Henry D. Sedgwick . .	New York . .	June 21, 1869.
" . . .	Marcus P. Bestow . .	" . . .	July 31, 1869.
" . . .	Alexander H. Nones . .	" . . .	July 31, 1869.
New Jersey . .	George W. Cassidy . .	Jersey City . .	Feb. 26, 1867.
" . . .	James F. Bond . . .	Newark . . .	May 29, 1867.
" . . .	Staats S. Morris . . .	" . . .	July 24, 1869.
Pennsylvania .	Edward Hopper . . .	Philadelphia .	Nov. 2, 1866.
" . . .	Theodore D. Rand . .	" . . .	Feb. 18, 1867.
" . . .	William F. Robb . . .	Pittsburgh . .	April 9, 1867.
" . . .	Charles Chauncey . .	Philadelphia .	June 7, 1867.
" . . .	J. Edward Carpenter .	" . . .	Aug. 22, 1867.
" . . .	Edward L. Perkins . .	" . . .	Dec. 28, 1867.
" . . .	John McClaren . . .	Pittsburgh . .	April 21, 1868.
" . . .	Samuel W. Pennypacker	Philadelphia .	July 24, 1868.
" . . .	Kinley J. Tener . . .	" . . .	Nov. 14, 1868.
" . . .	Charles E. Morris . . .	" . . .	Jan. 5, 1869.
" . . .	Joshua Spering . . .	" . . .	Mar. 5, 1869.
" . . .	Samuel L. Taylor . . .	" . . .	Aug. 4, 1869.
Delaware . . .	Samuel M. Harrington .	Wilmington . .	Mar. 5, 1869.
Maryland . . .	William W. Latimer . .	Baltimore . . .	Oct. 23, 1866.
" . . .	Hermon L. Emmons, Jr.	" . . .	April 16, 1868.
" . . .	Isaac Brooks . . .	" . . .	May 12, 1868.
" . . .	William B. Hill . . .	" . . .	Jan. 21, 1869.
Virginia . . .	Charles S. Bundy . . .	Richmond . . .	Sept. 18, 1868.
Dist. of Columbia.	Edmund F. Brown . .	Washington . .	Nov. 15, 1866.
" . . .	Nicholas Callan . . .	" . . .	Dec. 4, 1866.
" . . .	John F. Callan . . .	" . . .	Jan. 1, 1867.
" . . .	Richard Harrington . .	" . . .	Mar. 5, 1869.
" . . .	George F. McLellan . .	" . . .	May 5, 1869.
South Carolina .	Virginius J. Tobias . .	Charleston . .	Jan. 25, 1867.
" . . .	Reuben G. Holmes . .	Beaufort . . .	July 10, 1868.

State.	Name.	City or Town.	When appointed.
South Carolina . . .	Thomas Frost . . . .	Charleston . . . .	April 8, 1868.
" . . . .	Augustus E. Cohen . . .	" . . . .	Feb. 23, 1869.
" . . . .	Frederick A. Ford . . .	Aiken . . . .	July 31, 1869.
Georgia . . . .	Hugh F. Grant . . . .	Savannah . . . .	Nov. 15, 1866.
" . . . .	Ellery M. Brayton . . .	Augusta . . . .	" . . . .
" . . . .	William P. Goodall . . .	Macon . . . .	Oct. 18, 1867.
" . . . .	Edward C. Richardson . .	Savannah . . . .	Mar. 26, 1869.
" . . . .	Frank H. Miller . . . .	Augusta . . . .	June 8, 1869.
Tennessee . . . .	R. Dudley Frayser . . .	Memphis . . . .	Aug. 4, 1869.
" . . . .	Charles Seymour . . . .	Knoxville . . . .	Sept. 11, 1868.
Ohio . . . .	Samuel S. Carpenter . .	Cincinnati . . . .	Jan. 1, 1867.
" . . . .	Alexander H. McGuffey .	" . . . .	May 22, 1867.
" . . . .	George L. Ingersoll . . .	Cleveland . . . .	Aug. 9, 1867.
" . . . .	William H. Gorrill . . .	Toledo . . . .	July 24, 1868.
" . . . .	Hiram D. Peck . . . .	Cincinnati . . . .	Aug. 29, 1868.
" . . . .	James Wade, Jr. . . .	Cleveland . . . .	July 26, 1869.
Indiana . . . .	Luther R. Martin . . . .	Indianapolis . . . .	Sept. 2, 1867.
Michigan . . . .	William J. Waterman . .	Detroit . . . .	Jan. 1, 1867.
Louisiana . . . .	Alanson B. Long . . . .	New Orleans . . . .	Jan. 22, 1867.
" . . . .	P. Charles Cuvellier . .	" . . . .	Jan. 25, 1867.
" . . . .	Andrew Hero, Jr. . . .	" . . . .	May 1, 1867.
" . . . .	Thomas M. Gill . . . .	" . . . .	May 12, 1868.
" . . . .	James Graham . . . .	" . . . .	Oct. 26, 1868.
" . . . .	John G. Eustis . . . .	" . . . .	Dec. 23, 1868.
Illinois . . . .	William Eliot Furness . .	Chicago . . . .	Feb. 12, 1867.
" . . . .	Philip A. Hoynes . . . .	" . . . .	Feb. 13, 1867.
" . . . .	Charles McDonnell . . .	" . . . .	Mar. 26, 1867.
" . . . .	Oliver R. W. Lull . . . .	" . . . .	Oct. 18, 1867.
" . . . .	Henry Wisner . . . .	" . . . .	Nov. 28, 1868.
" . . . .	Simeon W. King . . . .	" . . . .	May 14, 1869.
Missouri . . . .	Edmund T. Allen . . . .	St. Louis . . . .	Oct. 23, 1866.
" . . . .	Joel G. Harper . . . .	" . . . .	Dec. 18, 1866.
" . . . .	Theodore Papin . . . .	" . . . .	Dec. 6, 1867.
" . . . .	Joseph L. Papin . . . .	" . . . .	Nov. 14, 1868.
" . . . .	Stephen P. Twiss . . . .	Kansas City . . . .	Dec. 23, 1868.
" . . . .	Rudolph Mackwitz . . .	St. Louis . . . .	Aug. 4, 1869.
Florida . . . .	William P. Dockray . . .	Jacksonville . . . .	Feb. 18, 1867.
" . . . .	Alva A. Knight . . . .	Lake City . . . .	Mar. 28, 1867.
" . . . .	Edward M. Cheney . . .	Jacksonville . . . .	April 30, 1867.
" . . . .	Oscar Hart . . . .	" . . . .	April 22, 1868.
Arkansas . . . .	Charles P. Redmond . . .	Little Rock . . . .	Mar. 5, 1867.
Wisconsin . . . .	Francis Bloodgood . . .	Milwaukee . . . .	Jan. 2, 1869.
Texas . . . .	William Longworth . . .	Sutherland Spr'gs . .	Oct. 1, 1867.
" . . . .	Emile Simmler . . . .	Houston . . . .	Dec. 29, 1868.
California . . . .	John White . . . .	San Francisco . . . .	Dec. 18, 1866.
" . . . .	Frederick J. Thibault . .	" . . . .	" . . . .
" . . . .	Samuel Cross . . . .	Sacramento . . . .	Feb. 5, 1867.
" . . . .	William O. Andrews . . .	San Francisco . . . .	May 7, 1867.

## LIST OF STATE AND COUNTY OFFICERS.

603

State.	Name.	City or Town.	When appointed.
California . . .	Edward Cadwalader . . .	Sacramento . . .	Sept. 24, 1867.
" . . .	Emile V. Sutter . . .	San Francisco . . .	Dec. 28, 1867.
" . . .	Henry Haight . . .	" . . .	Feb. 25, 1868.
" . . .	N. Proctor Smith . . .	" . . .	June 4, 1868.
" . . .	John S. Bugbee . . .	" . . .	June 22, 1868.
" . . .	James R. Lowe, Jr. . .	San Jose . . .	July 10, 1868.
" . . .	George N. Hitchcock . .	San Francisco . .	Mar. 2, 1869.
Nevada . . .	Charles G. Hubbard . .	Belmont . . .	April 10, 1867.
" . . .	Wm. A. M. Van Bokkelen	Virginia . . .	May 24, 1867.
" . . .	Joseph L. King . . .	" . . .	July 5, 1867.

COMMISSIONERS TO TAKE ACKNOWLEDGMENT OF DEEDS, &c., IN  
FOREIGN COUNTRIES.

(Gen. St. c. 14, ss. 45-47.)

John F. Pitman . . . . .	London . . . . .	England.
Charles F. Stansbury . . . . .	" . . . . .	"
David M. Stevens . . . . .	" . . . . .	"
John Henry Grain . . . . .	" . . . . .	"
William Grain . . . . .	" . . . . .	"
Frederick Stuart Edwards . . . .	Liverpool . . . . .	"
James Mortimer . . . . .	Paris . . . . .	France.
John Rose . . . . .	Montreal . . . . .	Lower Canada.
John H. Isaacson . . . . .	" . . . . .	" "
Alexander Campbell . . . . .	Kingston . . . . .	Upper Canada.
Stedman B. Campbell . . . . .	Toronto . . . . .	" "
William Knapp, Jr. . . . .	Hong Kong . . . . .	China.
Newcomb C. Tuckerman . . . . .	Calcutta . . . . .	Province of Bengal.
Gideon S. Holmes . . . . .	Cape Town . . . . .	Cape of Good Hope.
Charles Henry Richardson . . . .	Valparaiso . . . . .	Chili.
William L. Hobson . . . . .	" . . . . .	"

## BOARD OF EDUCATION.

(Gen. St. c. 84.)

Appointed.			Term expires.
June 10, 1868 . .	Gardiner G. Hubbard . .	Cambridge . . .	May 25, 1870.
July 31, 1863 . .	William Rice . . . . .	Springfield . . .	" 1871.
May 24, 1864 . .	Emory Washburn . . . .	Cambridge . . .	" 1872.
Feb. 15, 1865 . .	Samuel T. Seelye . . . .	Easthampton . . .	" 1873.
May 17, 1866 . .	John D. Philbrick . . . .	Boston . . . . .	" 1874.
May 29, 1867 . .	David H. Mason . . . . .	Newton . . . . .	" 1875.
May 26, 1868 . .	James Freeman Clarke . .	West Roxbury . .	" 1876.
May 25, 1869 . .	Alonzo A. Miner . . . . .	Boston . . . . .	" 1877.

## TRUSTEES OF STATE LIBRARY.

(Gen. St. c. 5, s. 2.)

Appointed.			Term expires.
Sept. 22, 1866 . .	Edwin P. Whipple . . .	Boston . . .	Sept. 22, 1869.
Jan. 19, 1869 . .	Jacob M. Manning . . .	Boston . . .	Jan. 19, 1872.
Jan. 19, 1869 . .	George O. Shattuck . . .	Boston . . .	Jan. 19, 1872.

## STATE BOARD OF AGRICULTURE.

(Gen. St. c. 16.)

Feb. 8, 1867 . .	Louis Agassiz . . .	Cambridge. . .	Feb. 1870.
Jan. 31, 1868 . .	Marshall P. Wilder . . .	Dorchester. . .	" 1871
Feb. 3, 1869 . .	James F. C. Hyde . . .	Newton . . .	" 1872

## STATE BOARD OF HEALTH.

(St. 1869, c. 420.)

July 31, 1869 . .	{ Henry I. Bowditch, M.D. }	Boston . . .	July 31, 1876.
	(Chairman) . . . }		
" " . .	{ George Derby, M.D. }	Boston . . .	" 1875.
	(Secretary) . . . }		
" " . .	Robert T. Davis . . .	Fall River . . .	" 1870.
" " . .	Richard Frothingham . . .	Charlestown . . .	" 1871.
" " . .	P. Emory Aldrich . . .	Worcester . . .	" 1874.
" " . .	Warren Sawyer . . .	Boston . . .	" 1872.
" " . .	William C. Chapin . . .	Lawrence . . .	" 1873.

## CHIEF OF BUREAU OF STATISTICS OF LABOR.

(Resolves 1869, c. 102.)

July 31, 1869 . .	Henry K. Oliver . . .	Salem . . .	May, 1871.
-------------------	-----------------------	-------------	------------

## BOARD OF STATE CHARITIES.

(St. 1863, c. 240.)

Oct. 14, 1864 . .	Nathan Allen . . .	Lowell . . .	Sept. 30, 1869.
Oct. 24, 1865 . .	Samuel G. Howe . . .	Boston . . .	" 1870.
Oct. 1, 1866 . .	Josiah C. Blaisdell . . .	Fall River . . .	" 1871.
March 3, 1868 . .	Edward Earle . . .	Worcester . . .	" 1872.
Nov. 5, 1868 . .	Moses Kimball . . .	Boston . . .	" 1873.
July 24, 1868 . .	{ Stephen C. Wrightington }	Fall River . . .	July 24, 1871.
	(Gen. Agent) . . . }		
Oct. 19, 1868 . .	Julius L. Clarke (Secretary)	Newton . . .	Oct. 19, 1871.

## VISITING AGENT OF INDIGENT CHILDREN.

(St. 1869, c. 453.)

June 28, 1869 . .	Gardiner Tufts . . .	Lynn . . .	Office at State House, Boston.
-------------------	----------------------	------------	--------------------------------

## BOARD OF RAILROAD COMMISSIONERS.

(St. 1869, c. 406.)			Term expires.
Appointed.			
July 24, 1869 . .	Charles F. Adams, Jr. . .	Boston . . . .	July 1, 1870.
" " . .	Edward Appleton . . . .	Reading . . . .	" 1871.
" " . .	James C. Converse . . . .	Southborough . .	" 1872.
— — . .	William A. Crafts, <i>Clerk</i> .	{ Boston, office at State House. }	—

## COMMISSIONER OF SAVINGS BANKS.

(St. 1866, c. 192.)		
June 21, 1869 . .	Frederick M. Stone . . .	Waltham . . . June 29, 1872.

## INSURANCE COMMISSIONER.

(St. 1866, c. 255.)		
June 21, 1869 . .	John E. Sanford . . . .	Taunton . . . July 1, 1872.

## COMMISSIONERS OF PUBLIC LANDS.

(St. 1861, c. 85.)		
Feb. 7, 1855 . .	Edward C. Purdy . . . .	Somerville . . . —
Aug. 6, 1858 . .	Franklin Haven . . . .	Boston . . . . —
Sept. 2, 1864 . .	Artemas Lee . . . . .	Templeton . . . —

## BOARD OF HARBOR COMMISSIONERS.

(St. 1866, c. 149.)		
June 29, 1866 . .	Samuel E. Sewall . . . .	Melrose . . . . July 1, 1870.
June 29, 1866 . .	Josiah Quincy . . . . .	Boston . . . . " 1871.
Dec. 31, 1867 . .	Frederick W. Lincoln, Jr. .	Boston . . . . " 1872.
July 10, 1868 . .	Darwin E. Ware . . . . .	Marblehead . . " 1878.

## COMMISSIONERS OF PILOTS FOR THE HARBOR OF BOSTON.

(St. 1862, c. 176, s. 3.)		
July 10, 1868 . .	Elias E. Davison . . . .	Boston . . . . June 18, 1871.
July 24, 1869 . .	Jacob G. Pierce . . . . .	Milton . . . . June 18, 1871.

## PORT WARDENS.

(St. 1862, c. 176, s. 11-14.)		
June 18, 1862 . .	John Holmes . . . . .	Tisbury . . . Buzzards Bay & Viney'd.
June 26, 1862 . .	Joshua B. Tobey . . . .	Wareham . . " ; "
July 24, 1862 . .	Jonathan Bourne, Jr. . .	New Bedford . " " "
Feb. 9, 1863 . .	Abraham Osborne . . . .	Edgartown . . " " "
June 10, 1868 . .	James B. Wood . . . . .	New Bedford . " " "

## LIST OF STATE AND COUNTY OFFICERS.

July 30, 1862 .	Sylvanus N. Staples .	Taunton . .	Taunton River.
Aug. 15, 1862 .	Job M. Leonard . .	Somerset . .	" "
Oct. 21, 1862 .	John P. Slade . . .	Fall River . .	" "
Oct. 7, 1862 .	Nathaniel E. Atwood .	Provincetown .	Provincetown.
Oct. 7, 1862 .	Joseph P. Johnson .	Provincetown .	Provincetown.
Feb. 4, 1868 .	Joseph B. Barnham .	Gloucester . .	Gloucester & Rockport.
" " .	David W. Low . . .	" . .	" "
Sep. 14, 1869 .	George W. Somers . .	" . .	" "

## COMMISSIONERS ON INLAND FISHERIES.

(Term of office, 5 years. (St. 1869, c. 384; — St. 1866, c. 238.)

June 29, 1866 . . . . .	Theodore Lyman . . . . .	Brookline.
June 29, 1866 . . . . .	Alfred R. Field . . . . .	Greenfield.
July 7, 1869 . . . . .	Edward A. Brackett . . . . .	Winchester.

## TRUSTEES OF MASSACHUSETTS GENERAL HOSPITAL.

(Spec. St. 1864, c. 46.)

Feb. 3, 1869 . . . . .	William S. Bullard . . . . .	Boston.
Sep. 14, 1869 . . . . .	Ezra Farnsworth . . . . .	"
May 28, 1869 . . . . .	Samuel G. Howe . . . . .	"
May 28, 1869 . . . . .	James L. Little . . . . .	"

## INSPECTORS OF STATE PRISON.

(Gen. St. c. 179, s. 8.)

April 11, 1867 . .	Everett Torrey . . . . .	Charlestown . .	April 1, 1870.
April 7, 1868 . .	James Pierce . . . . .	Malden . . . . .	" 1871.
May 20, 1869 . .	Edward H. Dunn . . . . .	Boston . . . . .	" 1872.
May 27, 1868 . .	Gideon Haynes, <i>Warden</i> .		
July 29, 1868 . .	John G. Dearborn, <i>Physician and Surgeon</i> .		
Dec. 26, 1860 . .	Geo. J. Carleton, <i>Chaplain</i> .		

## AGENT FOR DISCHARGED CONVICTS.

(Gen. St. c. 179, s. 64.)

Jan. 5, 1866 . . . . .	Daniel Russell . . . . .	Boston.
------------------------	--------------------------	---------

## INSPECTORS OF STATE ALMSHOUSE AT BRIDGEWATER.

(Gen. St. c. 71, s. 32.)

Feb. 8, 1867 . .	James H. Mitchell . . . . .	East Bridgewater	Feb. 1870.
Mar. 11, 1868 . .	Joseph B. Thaxter . . . . .	Hingham . . . . .	" 1871.
Feb. 3, 1869 . .	John B. Hathaway . . . . .	Fall River . . . . .	" 1872.
Nov. 17, 1868 . .	Levi L. Goodspeed, <i>Superintendent</i> .		

## INSPECTORS OF STATE ALMSHOUSE AT MONSON.

(Gen. St. c. 71, s. 82.)

Appointed.			Term expires.
July 22, 1867 . .	Thomas Rice . . . . .	Shrewsbury . . .	Feb. 1870.
Mar. 11, 1868 . .	Gordon M. Fisk . . . . .	Palmer . . . . .	„ 1871.
Feb. 3, 1869 . .	Eleazer Porter . . . . .	Hadley . . . . .	„ 1872.
Mar. 20, 1868 . .	Horace P. Wakefield . . .	Reading, <i>Superintendent.</i>	

## INSPECTION OF STATE ALMSHOUSE AT TEWKSBURY.

(Gen. St. c. 71, s. 82.)

July 22, 1867 . .	Benjamin C. Perkins . . .	Peabody . . . . .	Feb. 1870.
Mar. 11, 1868 . .	George P. Elliot . . . . .	BillERICA . . . . .	„ 1871.
Feb. 3, 1869 . .	Francis H. Nourse . . . . .	Lowell . . . . .	„ 1872.
June 10, 1868 . .	Thomas J. Marsh, <i>Superintendent.</i>		

## TRUSTEES OF STATE REFORM SCHOOL AT WESTBOROUGH.

(Gen. St. c. 76, s. 1.)

Feb. 8, 1867 . .	Stephen G. Deblois . . . . .	Boston . . . . .	Feb. 1870.
Mar. 11, 1868 . .	Harmon Hall . . . . .	Saugus . . . . .	„ 1870.
Feb. 8, 1867 . .	Edward A. Goodnow . . . . .	Worcester . . . . .	„ 1871.
Mar. 11, 1868 . .	John Ayres . . . . .	Medford . . . . .	„ 1871.
Mar. 11, 1868 . .	George C. Davis . . . . .	Northborough . . . . .	„ 1872.
Feb. 3, 1869 . .	Levi L. Goodspeed . . . . .	Bridgewater . . . . .	„ 1872.
„ „ . .	Eli A. Hubbard . . . . .	Springfield . . . . .	„ 1873.
„ „ . .	George C. Davis, <i>Treas.</i> . . . .	Northborough . . . . .	„ 1872.

## TRUSTEES OF THE MASSACHUSETTS NAUTICAL SCHOOL.

(Gen. St. c. 76, s. 12.—St. 1866, c. 224.—St. 1867, c. 280.)

June 14, 1865 . .	Thomas Russell . . . . .	Boston . . . . .	Feb. 1870.
Feb. 2, 1866 . .	William T. Davis . . . . .	Plymouth . . . . .	„ 1871.
Feb. 8, 1867 . .	William Fabens . . . . .	Marblehead . . . . .	„ 1872.
Mar. 11, 1868 . .	Alfred C. Hersey . . . . .	Hingham . . . . .	„ 1873.
Feb. 3, 1869 . .	Matthew Howland . . . . .	New Bedford . . . . .	„ 1874.
July 20, 1865 . .	Charles W. Reed, <i>Treas.</i> . . . .	Boston,	

## TRUSTEES OF THE STATE INDUSTRIAL SCHOOL FOR GIRLS.

(Gen. St. c. 75, s. 1.)

Feb. 2, 1866 . .	Daniel Denny . . . . .	Dorchester . . . . .	Feb. 1870.
Feb. 8, 1867 . .	George B. Emerson . . . . .	Boston . . . . .	„ 1870.
Dec. 28, 1867 . .	John L. S. Thompson . . . . .	Lancaster . . . . .	„ 1871.
Mar. 11, 1868 . .	Russell Sturgis, Jr. . . . .	Boston . . . . .	„ 1871.



Appointed.			Term expires.
Mar. 11, 1868 . .	Albert Tolman . . . . .	Worcester . . . .	1872.
Feb. 8, 1869 . .	George Cummings . . . .	Lancaster . . . .	1872.
Feb. 8, 1869 . .	Frank B. Fay . . . . .	Chelsea . . . . .	1873.
Oct. 3, 1865 . .	Frank B. Fay . . . . .	„ Treasurer.	

#### ADVISORY BOARD OF WOMEN TO TRUSTEES OF STATE INDUSTRIAL SCHOOL FOR GIRLS.

(St. 1868, c. 153.)

June 22, 1868 . .	Miss Elizabeth Fisher . .	Lancaster . . . .	July 1, 1870.
June 22, 1868 . .	Mrs. Rachael S. Howland .	New Bedford . . .	1871.
July 10, 1869 . .	Mrs. Mary A. Fay . . . .	Worcester . . . .	1872.

#### TRUSTEES OF STATE LUNATIC HOSPITAL AT WORCESTER.

(Gen. St. c. 73, s. 1.)

Mar. 11, 1868 . .	Charles Mattoon . . . . .	Greenfield . . . .	Feb. 1870.
Feb. 2, 1866 . .	Henry Chapin . . . . .	Worcester . . . .	1871.
Feb. 8, 1867 . .	William Workman . . . .	Worcester . . . .	1872.
Mar. 11, 1868 . .	Samuel E. Sewall . . . .	Melrose . . . . .	1873.
Feb. 8, 1869 . .	Robert W. Hooper . . . .	Boston . . . . .	1874.

#### TRUSTEES OF STATE LUNATIC HOSPITAL AT TAUNTON.

(Gen. St. c. 73, s. 1.)

Feb. 15, 1865 . .	Charles R. Atwood . . . .	Taunton . . . . .	Feb. 1870.
Feb. 2, 1866 . .	George Howland, Jr. . . .	New Bedford . . .	1871.
Feb. 8, 1867 . .	Oliver Ames . . . . .	Easton . . . . .	1872.
Mar. 11, 1868 . .	Charles Edward Cook . . .	Boston . . . . .	1873.
Feb. 8, 1869 . .	Le Baron Russell . . . .	Boston . . . . .	1874.

#### TRUSTEES OF STATE LUNATIC HOSPITAL AT NORTHAMPTON.

(Gen. St. c. 73, s. 1.)

Feb. 15, 1865 . .	Eliphalet Trask . . . . .	Springfield . . .	Feb. 1870.
Feb. 2, 1866 . .	Henry L. Sabin . . . . .	Williamstown . . .	1871.
Feb. 8, 1867 . .	Edmund H. Sawyer . . . .	Easthampton . . .	1872.
Mar. 11, 1868 . .	Edward Hitchcock . . . .	Amherst . . . . .	1873.
Feb. 8, 1869 . .	Silas M. Smith . . . . .	Northampton . . .	1874.

#### INSPECTORS GENERAL.

(Gen. St. c. 49, s. 1.)

##### OF FISH.

Aug. 24, 1866 . .	William Cogswell . . . .	Salem . . . . .	Aug. 24, 1871.
-------------------	--------------------------	-----------------	----------------

##### OF POT AND PEARL ASHES.

Nov. 21, 1867 . .	Moody D. Cook . . . . .	Newburyport . . .	Nov. 21, 1872.
-------------------	-------------------------	-------------------	----------------

## OF LEATHER.

Appointed.		Term expires.
Nov. 22, 1866 . .	George C. Hodgdon . . . Salem . . .	Nov. 22, 1871.

---

## INSPECTOR OF GAS AND GAS METERS.

(St. 1861, c. 168.)

Feb. 26, 1867 . .	Frederick E. Stimpson . .	West Roxbury .	Feb. 26, 1870.
-------------------	---------------------------	----------------	----------------

---

## STATE ASSAYERS OF ORES AND METALS.

(Gen. St. c. 49, s. 146.)

July 2, 1846 . .	Charles T. Jackson . . .	Boston . . .	—
April 15, 1846 . .	Augustus A. Hayes . . .	Boston . . .	—
Sept. 2, 1867 . .	Samuel Dana Hayes . . .	Brookline . . .	—

---

## SURVEYOR GENERAL OF LUMBER.

(Gen. St. c. 49, s. 126.)

Jan. 26, 1869 . .	George W. Cram . . .	Cambridge . .	Jan. 26, 1872.
-------------------	----------------------	---------------	----------------

---

## CONSTABLE OF THE COMMONWEALTH.

(St. 1865, c. 249.)

Jan. 20, 1869 . .	Edward J. Jones . . .	Boston . . .	Jan. 20, 1872.
-------------------	-----------------------	--------------	----------------

---

## STATE LIQUOR COMMISSIONER.

(St. 1869, c. 415, s. 1.)

July 10, 1869 . .	Joseph A. Brodhead . . .	Boston . . .	Jan. 1870.
-------------------	--------------------------	--------------	------------

---

## STATE LIQUOR ASSAYER.

(St. 1869, c. 415, s. 25.)

—	— . .	Samuel Dana Hayes . . .	Brookline . . .	—
---	-------	-------------------------	-----------------	---

Ex. J. H.  
J. 39





